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# Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law

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# **GANG DEFINITIONS, HOW DO THEY WORK?: WHAT THE JUGGALOS TEACH US ABOUT THE INADEQUACY OF CURRENT ANTI-GANG LAW**

*Precisely what constitutes a gang has been a hotly contested academic issue for a century. Recently, this problem has ceased to be purely academic and has developed urgent, real-world consequences. Almost every state and the federal government has enacted anti-gang laws in the past several decades. These anti-gang statutes must define ‘gang’ in order to direct police suppression efforts and to criminally punish gang members or associates. These statutory gang definitions are all too often vague and overbroad, as the example of the Juggalos demonstrates. The Juggalos are the fans of Insane Clown Posse, and have been declared a gang by several states and organs of the federal government despite all evidence to the contrary. The Juggalos are merely one example of how overbroad gang definitions have enabled arbitrary and discriminatory police action. This Comment discusses these faulty gang definitions, how gangs are defined in a non-legal context, and solutions to the gang definition problem.*

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## I. INTRODUCTION

In 2011, the National Gang Intelligence Center declared the Juggalos a gang.<sup>1</sup> Law enforcement in four states had already decided that the Juggalos constituted a gang, but only when the National Gang Intelligence Center, an organization established by the FBI in 2005,<sup>2</sup> made its classification did the national media take notice. The reaction by Juggalos has been a series of denials that their group constitutes a gang.<sup>3</sup> Recently, a federal suit has been filed by Insane Clown Posse band members, individual Juggalos, and the ACLU, challenging this classification.<sup>4</sup>

These developments have been reported in the press as a comical sideshow.<sup>5</sup> However, theoretical concerns that have repeatedly been raised about the wisdom of current definitions of criminal gangs in anti-gang statutes have been made real in the case of the Juggalos. This Comment will explore these concerns, using the real-life example of the Juggalos' gang classification to avoid becoming too abstract and theoretical.<sup>6</sup> Part II will briefly explain who the Juggalos are. Part III

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1. NAT'L GANG INTELLIGENCE CTR., 2011 NATIONAL GANG THREAT ASSESSMENT—EMERGING TRENDS 22 (2011).

2. *Id.*; *National Gang Intelligence Center*, FBI, [http://www.fbi.gov/about-us/investigate/vc\\_majorthfts/gangs/ngic](http://www.fbi.gov/about-us/investigate/vc_majorthfts/gangs/ngic) (last visited May 6, 2014).

3. *See, e.g.*, Martin Cizmar, *Insane Clown Posse's Juggalos Aren't a Gang—Just Punk Kids*, PHOENIX NEW TIMES (Nov. 20, 2008), <http://www.phoenixnewtimes.com/2008-11-20/music/insane-clown-posse-s-juggalos-aren-t-a-gang-just-punk-kids/>.

4. *ACLU, Insane Clown Posse File Lawsuit Challenging FBI Gang Designation*, ACLU (Jan. 8, 2014), <https://www.aclu.org/free-speech/aclu-insane-clown-posse-file-lawsuit-challenging-fbi-gang-designation>; Dave Itzkoff, *Rap Group Defends Fans, with Lawsuit*, N.Y. TIMES, Jan. 9, 2014, at C1.

5. Camille Dodero, *That Silly Thing about the FBI Classifying Juggalos as a Gang? It's No Joke*, VILLAGE VOICE BLOGS (Aug. 9, 2012, 2:54 PM), [http://blogs.villagevoice.com/music/2012/08/fbi\\_juggalos\\_gang\\_most\\_wanted.php](http://blogs.villagevoice.com/music/2012/08/fbi_juggalos_gang_most_wanted.php).

6. Courts have often rejected a legal challenge to an anti-gang statute on the grounds that while constitutional rights of non-gang members may be threatened by the allegedly vague or overbroad gang definition at issue, the instant appeal of the defendant should be rejected because his conduct was obviously prohibited by the statute. *See, e.g.*, *State v. Baldenegro*, 932 P.2d 275, 279 (Ariz. Ct. App. 1996) (“A defendant whose conduct is clearly proscribed by the core of the statute has no standing to attack the statute. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” (quoting *State v. Tocco*, 750 P.2d 874, 877 (Ariz. 1988)) (internal quotation marks omitted)); *People v. Jamesson*, 768 N.E.2d 817, 825 (Ill. App. Ct. 2002) (“So long as a defendant’s conduct clearly falls within the statutory proscription, a defendant may be prosecuted under the statute in harmony with due process, even though the statute may be vague as to other conduct.” (citing *People v. Izzo*, 745 N.E.2d 548, 551 (Ill. 2001))).

will examine gang definitions in existing social science research. Part IV is an overview of law enforcement definitions of gang. Part V is a survey of legislative enactments, and judicial interpretations of these enactments, defining and criminalizing the gang. Part V first examines the STEP Act, the legislation first defining a “criminal street gang” in California and the law that inspired the rest of the nation’s jurisdictions to follow suit. Part V concludes with a brief overview of the rest of the country’s gang definitions. Part VI explains why gang definitions matter, specifically the constitutional rights that are impaired when vague or overbroad gang definitions are used by the criminal justice system. Part VII will examine a few suggestions on ways to ameliorate current problems with the way gangs are defined.

## II. WHO ARE THE JUGGALOS?

### A. *Fans of Insane Clown Posse*

Juggalo is the eponym for fans of the Detroit-based hip-hop group Insane Clown Posse (ICP).<sup>7</sup> ICP is made up of two men, Joe Bruce (alias Violent J) and Joey Utsler (alias Shaggy 2 Dope), who formed the group in 1989.<sup>8</sup> To stand out in the crowded early 1990s rap scene, the pair wore clown makeup and sung about a “Dark Carnival” full of sex and violence.<sup>9</sup> Bruce and Utsler pulled tropes from professional wrestling, larger than life personas and complex storylines, and applied them to rap, forming a bizarre sub-genre called horror-rap or horrorcore.<sup>10</sup> Bruce described the Violent J and Shaggy 2 Dope characters as “clowns who murder and kill people who deserve to be murdered and killed!”<sup>11</sup>

With their face paint and elaborate stage shows, ICP appears to simply be a rap-based riff on the band KISS, but critics have treated the band as the end of Western civilization. Their music has been described

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7. The neologism was derived from the word “juggler,” after a juggler clown character in the rap group. Melissa Meinzer, *Juggalos Are Us*, PITTSBURGH CITY PAPER (Nov. 9, 2006), <http://www.pghcitypaper.com/pittsburgh/juggalos-are-us/Content?oid=1334381>.

8. *History: The Origins of the Dark Carnival*, INSANE CLOWN POSSE, <http://www.insaneclownposse.com/about/history/> (last visited May 6, 2014).

9. Robert Bell, *Insane Clown Posse*, ARK. TIMES (Nov. 26, 2009), <http://www.arktimes.com/arkansas/insane-clown-posse/Content?oid=947211>.

10. *Nightline: Insane Clown Posse* (ABC television broadcast Mar. 9, 2010), available at <http://abcnews.go.com/Nightline/video/nightline-030910-10058253>.

11. Camille Doder, *Revenge of the Losers*, VILLAGE VOICE, Sept. 8, 2010, at 10, 12.

as “an artistic black hole”;<sup>12</sup> aggressively, frighteningly stupid;<sup>13</sup> and as similar to a puerile nursery rhyme.<sup>14</sup> ICP has been declared “the worst band in history.”<sup>15</sup> ICP lyrics frequently contain references to absurd levels of violence and sexual depravity.<sup>16</sup> The violence in ICP’s music is frequently directed at those who “deserve” it, in Bruce’s words, such as rednecks, bigots, wife beaters, cheaters, and pedophiles.<sup>17</sup>

While ICP has earned the enmity of the critical community, major record labels, MTV, and radio stations have simply ignored the group.<sup>18</sup> If the mainstream media is paying attention to ICP and their fans, it is usually to mock them.<sup>19</sup> Despite the apathy (and general hostility) of the mainstream community, ICP have sold over seven million albums; they have two platinum and three gold records, no mean feat in an age of anemic CD sales.<sup>20</sup> They make an estimated \$10 million a year.<sup>21</sup> ICP established a wrestling league, started their own successful record label, produced direct-to-video films, and manufactured and sold a litany of merchandise from baby clothes to energy drinks.<sup>22</sup> Recently, the group starred in a cable television series.<sup>23</sup>

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12. Craig Outhier, *Insane Clown Posse: Tracing the Sociological Lineage of Juggalos*, PHOENIX NEW TIMES (June 3, 2010), <http://www.phoenixnewtimes.com/2010-06-03/music/insane-clown-posse-tracing-the-sociological-lineage-of-juggalos/full/>.

13. Bell, *supra* note 9.

14. *Nightline: Insane Clown Posse*, *supra* note 10; Brian Raftery, *The Rise of the Juggalos*, WIRED, Dec. 2010, at 194, 196.

15. John Nova Lomax, *I’m Just a Juggalo*, HOUSTON PRESS, Aug. 30, 2007, available at ProQuest, Doc. No. 367893415; see also ChasinDatPaper, *GQ Names the 25 Worst Rappers of All Time*, THISIS50 (July 9, 2013, 1:30 PM), <http://www.thisis50.com/profiles/blogs/gq-names-the-25-worst-rappers-of-all-time>.

16. Raftery, *supra* note 14, at 196.

17. Dodero, *supra* note 11, at 18.

18. Todd Martens, *Insane Clowns Prosper*, BILLBOARD, April 7, 2007, at 10; Raftery, *supra* note 14, at 196.

19. Nathan Rabin, *Strange Times at the 2012 Gathering of the Juggalos*, A.V. CLUB (Aug. 14, 2012), <http://www.avclub.com/article/strange-times-at-the-2012-gathering-of-the-juggalo-83814> (listing, among the television shows that have aired parodies of the group, *It’s Always Sunny in Philadelphia*, *Workaholics*, *Aqua Teen Hunger Force*, and *Saturday Night Live*); see also Dave Itzkoff, *Fools’ Gold: An Oral History of the Insane Clown Posse Parodies*, N.Y. TIMES (Apr. 26, 2010, 11:27 AM), <http://artsbeat.blogs.nytimes.com/2010/04/26/fools-gold-an-oral-history-of-the-insane-clown-posse-parodies>.

20. Raftery, *supra* note 14, at 198; Dodero, *supra* note 11, at 10.

21. Brian McCollum, *Merch Masters*, DETROIT FREE PRESS, Oct. 25, 2009, at 6K.

22. Raftery, *supra* note 14, at 198.

23. Lily Rothman, *Insane Clown Posse Explains Insane Clown Posse*, TIME (July 24, 2013), <http://entertainment.time.com/2013/07/24/insane-clown-posse-explains-insane-clown-posse>.

### B. The Juggalo "Family"

ICP have managed this success due to their fairly large and extremely devoted fan base. Juggalos are "everywhere."<sup>24</sup> Although the Juggalos are stereotypically white teenage males,<sup>25</sup> they include members of both sexes as well as a variety of ages, and the group is somewhat ethnically and racially heterogeneous as well.<sup>26</sup> Juggalos are "overwhelmingly working-class."<sup>27</sup> Juggalos refer to female fans as "Juggalettes" and sometimes call themselves "Ninjas."<sup>28</sup> A Juggalo will identify himself by saying he is "down with the clown."<sup>29</sup> They wear clothing bearing the "hatchet man" logo, depicting a silhouette of a man carrying a large hatchet.<sup>30</sup> They frequently take on a dark clown alter ego like Bruce and Utsler, with a separate name and a personalized pattern of clown face paint they wear to ICP shows.<sup>31</sup> They also have their own odd vocalization, a "whoop whoop" to express solidarity and approval.<sup>32</sup> They also treat Faygo, a bargain soda from Detroit, as a sort of sacrament.<sup>33</sup> Bruce and Utsler spray their fans with the beverage at shows and hurl the bottles into the crowd.<sup>34</sup>

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24. Bell, *supra* note 9. At least one court apparently believes that the Juggalos are based in Washington State, but this is inaccurate. See *Baribeau v. City of Minneapolis*, 596 F.3d 465, 471 (8th Cir. 2010). Juggalos live throughout the United States, with concentrations in the Midwest, especially near the birthplace of ICP in Detroit, as well as in Colorado, Utah, and Arizona. Cizmar, *supra* note 3.

25. Scott Smith, *Prosecutor Says Suspect in Attack Part of Alleged Juggalos Gang*, RECORDNET.COM (Jan. 24, 2010, 12:00 AM), [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100124/A\\_NEWS/1240317&cid=sitesearch](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100124/A_NEWS/1240317&cid=sitesearch).

26. Lomax, *supra* note 15.

27. NATHAN RABIN, YOU DON'T KNOW ME BUT YOU DON'T LIKE ME: PHISH, INSANE CLOWN POSSE, AND MY MISADVENTURES WITH TWO OF MUSIC'S MOST MALIGNED TRIBES 4 (2013); see also Cizmar, *supra* note 3 (describing Juggalos as "socioeconomically and socially underprivileged").

28. Jim Guy, *Just Clowning Around?—Police Call Juggalos a Gang. The Facepainted Group Say They Are Simply Music Fans*, FRESNO BEE, July 18, 2009, at A1.

29. Dodero, *supra* note 11, at 16.

30. Cizmar, *supra* note 3; Smith, *supra* note 25.

31. Guy, *supra* note 28; Susan Herendeen, *Juggalos Take Issue with Label as a Gang—Culture Is About Music, Not Violence, Fans Insist*, MODESTO BEE, July 5, 2009, at B1 (relating the opinion that "Juggalos are just kids who have a weird sense of humor and wish it were Halloween every day"); Smith, *supra* note 25; John Tarpley, *Hard to Keep a Good Clown Down*, ARK. TIMES (Nov. 25, 2010), <http://www.arktimes.com/arkansas/hard-to-keep-a-good-clown-down/Content?oid=1405958>.

32. Dodero, *supra* note 11, at 16.

33. *Id.* at 10.

34. Lomax, *supra* note 15.

Perhaps more notable than the fact that they follow ICP is the fact that Juggalos—often stereotyped as violent, racist, uneducated, and ignorant—constitute the “most mocked and reviled subculture in existence.”<sup>35</sup> Violent J of the ICP described the prototypical Juggalo as “some sort of underdog” that “feel[s] like they’re fucked with a lot, or they’re misunderstood.”<sup>36</sup>

Juggalos view themselves as “united by their outsider status and loving acceptance of one another.”<sup>37</sup> An ICP show has been likened to a “traveling cult of the dispossessed.”<sup>38</sup> ICP have embraced their status as outcasts (they seem to be about as socially marginalized as multi-millionaires possibly can be), and their fans tend to be unpopular as well.<sup>39</sup> Juggalos are self-proclaimed dregs of society unable to fit in with normal high school cliques; they took the simple expedient of creating their own subculture in order to be accepted.

Most frequently, Juggalos describe themselves not as a gang, a cult, or even as a group of music fans, but as a “family.”<sup>40</sup> Juggalos have been described as a “unified front of self-defined misfits and outcasts.”<sup>41</sup> The group for many satisfies “the primal need for community and the necessary sense of self-worth.”<sup>42</sup> The music of ICP supposedly contains

35. RABIN, *supra* note 27, at 2–3.

36. Ellen Cushing, *Insane Clown Posse’s Violent J on Haircuts, Haters, and Ben Folds Five*, E. BAY EXPRESS (May 29, 2013, 11:33 AM), <http://www.eastbayexpress.com/CultureSpy/Blog/archives/2013/05/29/insane-clown-posses-violent-j-on-haircuts-haters-and-ben-folds-five>.

37. Meinzer, *supra* note 7.

38. Chris Parker, *Insane Clown Posse’s Fan Reflection*, INDYWEEK (Oct. 12, 2011), <http://www.indyweek.com/indyweek/insane-clown-posses-fan-reflection/Content?oid=2680593>.

39. Or, in the argot of the Juggalos, “scrubs.” Dodero, *supra* note 11, at 14; *see also* Guy, *supra* note 28 (citing an eighteen-year-old Juggalo who describes Juggalos as “young people who grew up feeling alienated from society and rally around the music of ICP”); Raftery, *supra* note 14, at 226 (“[Juggalos] tend to feel that they’ve been misunderstood outsiders their whole lives, whether for being overweight, looking weird, being poor, or even for just liking ICP in the first place.”).

40. Cizmar, *supra* note 3; Smith, *supra* note 25; Sean Dieterich, *Police, Schools Watching ‘Juggalos’—Classified as Gang in Arizona*, INDEPENDENT (Nov. 23, 2010, 5:00 AM), [http://www.wmicentral.com/news/latest\\_news/police-schools-watching-juggalos—classified-as-gang-in/article\\_f9424c24-f365-11df-8dd4-001cc4c002e0.html](http://www.wmicentral.com/news/latest_news/police-schools-watching-juggalos—classified-as-gang-in/article_f9424c24-f365-11df-8dd4-001cc4c002e0.html).

41. Tarpley, *supra* note 31.

42. *Id.*; *see also* Karen Bettez Halnon, *Heavy Metal Carnival and Dis-alienation: The Politics of Grotesque Realism*, 29 SYMBOLIC INTERACTION 33, 34–35 (2006) (discussing heavy metal music, including that of ICP, that is often dismissed as merely reinforcing alienation, but in fact “is a critical source of positive meaning for its audiences’ everyday life needs” (citing Joseph A. Kortarba, *Baby Boomer Rock ‘n’ Roll Fans and the Becoming of Self*, in POSTMODERN EXISTENTIAL SOCIOLOGY 103, 104 (Joseph A. Kortarba & John M. Johnson



“a sincere message of unity that’s almost desperately sentimental.”<sup>43</sup> The Juggalos themselves refer to the bond among their subculture as “clown luv.”<sup>44</sup> The community feeling of the Juggalos is further enhanced by the hostility of mainstream society.<sup>45</sup> The Juggalos universally deny that they are a gang and many claim the group is nonviolent.<sup>46</sup>

### C. “A Loosely Organized Hybrid Gang”

Despite Juggalos’ self-image as a non-violent family, law enforcement has often targeted them, and for reasons beyond basic coulrophobia.<sup>47</sup> The 2011 National Gang Threat Assessment categorized the Juggalos as a “Non-Traditional Gang.”<sup>48</sup> The Assessment describes Juggalos as “loosely organized” and a “hybrid gang,”<sup>49</sup> described elsewhere in the report as a “non-traditional gang[] with multiple affiliations.”<sup>50</sup> The Assessment asserts that law enforcement in twenty-one states<sup>51</sup> have identified “criminal Juggalo

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eds., 2002))).

43. Outhier, *supra* note 12.

44. Halnon, *supra* note 42, at 42 (internal quotation marks omitted).

45. See Cory Garcia, *It’ll Take More than a Newsletter to Clean Up the Word Juggalo*, HOUSTON PRESS BLOGS (Feb. 22, 2013, 6:00 AM), [http://blogs.houstonpress.com/rocks/2013/02/juggalos\\_fight\\_back\\_kind.php?page=2](http://blogs.houstonpress.com/rocks/2013/02/juggalos_fight_back_kind.php?page=2).

46. *Nightline*, *supra* note 10; Guy, *supra* note 28.

47. Coulrophobia is fear of clowns; ICP and the Juggalos have consciously embraced a “monster clown” image. See generally Joseph Durwin, *Coulrophobia and the Trickster*, 3 TRICKSTER’S WAY 1 (2004), <http://digitalcommons.trinity.edu/trickstersway/vol3/iss1/4>.

48. NAT’L GANG INTELLIGENCE CTR., *supra* note 1, at 22. Presumably there is some difference between a normal gang and a “non-traditional” one, but a reader searches the report in vain for an explanation of this distinction.

49. *Id.* A hybrid gang is an ethnically mixed gang. JAMES C. HOWELL, GANGS IN AMERICA’S COMMUNITIES 22 (2012). They are generally more loosely organized than other gangs and are considered a relatively recent phenomenon. *Id.* at 22–23. American gangs appear to have first developed along ethnic lines in the 18th and 19th centuries, and many gangs today continue to be racially or ethnically based. GEORGE W. KNOX, NATIONAL GANGS RESOURCE HANDBOOK: AN ENCYCLOPEDIA REFERENCE 3 (1994). However, racially mixed gangs have been relatively common since at least the 1920s in America. FREDERIC M. THRASHER, THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO 146, 191 (1927) (listing the nationalities of 880 gangs in Chicago and finding that 39.89% were of mixed nationalities).

50. NAT’L GANG INTELLIGENCE CTR., *supra* note 1, at 22.

51. *Id.* at 22–23. A box on page 23 of the report describes which states report Juggalo activity; however, it fails to match the states listed in Appendix A of the report as having Juggalo activity. Compare *id.* at 23, with *id.* at app. A. Page 23 lists Colorado, Delaware, Illinois, Oregon, Texas, and Virginia, which in the appendix lack Juggalo activity; the appendix additionally lists Juggalos as being active in Alabama, Montana, New York, and

sub-sets”; that these subsets “exhibit gang-like behavior and engage in criminal activity and violence”; including “assaults, thefts, robberies, and drug sales.”<sup>52</sup> The Assessment also claims that Juggalo criminal activity has expanded in recent years.<sup>53</sup>

A footnote in the Assessment acknowledges that Juggalos are fans of ICP, but no other indication of their primary activities or motivations are discussed in the report.<sup>54</sup> The Assessment describes the Juggalos as a whole as a gang in its first sentence on the group, then describes the criminal Juggalos as “subsets” and “a small number” of the total population in the rest of the section.<sup>55</sup> The classification of the Juggalos as a gang has been widely mocked, with one commentator saying, sardonically, “[t]he FBI has recently had difficulty distinguishing ordinary American Muslims from terrorists; now it appears it has a similar problem distinguishing teenage fads from criminal conspiracies.”<sup>56</sup>

This is not to say that the National Gang Intelligence Center manufactured the Juggalo-criminality link out of whole cloth. Individual Juggalos have been implicated in a wide variety of crimes. In Utah, two Juggalos attempted a kidnapping of a five-year-old boy<sup>57</sup> and two others attempted to murder a man with a battle-axe.<sup>58</sup> In Pennsylvania, two Juggalos were charged with a murder and identified as part of a “dangerous and growing gang.”<sup>59</sup> Twenty-three people were attacked randomly by Juggalos in a park in Tacoma, Washington.<sup>60</sup> In King County, Washington, a suspected Juggalo shot a couple.<sup>61</sup> Also in

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Wyoming. Compare *id.* at 23, with *id.* at app. A at 49, 54–55, 59, 69–71, 73, 76–79.

52. *Id.* at 22–23.

53. *Id.* at 22.

54. *Id.*

55. *Id.* at 22–23.

56. Spencer Ackerman, *FBI's Newest Gang Threat: Insane Clown Posse Fans*, WIRED (Oct. 27, 2011, 4:00 PM), <http://www.wired.com/dangerroom/2011/10/fbi-gang-insane-clown-posse/>.

57. 2 *Arrested in Attempted Kidnapping*, KSL (Sept. 10, 2008, 3:25 PM), <http://www.ksl.com/?nid=148&sid=4225190>.

58. Gene Kennedy, *Men Charged in Medieval Battle-Ax Attack*, KSL (July 31, 2008, 5:58 PM), <http://www.ksl.com/?nid=148&sid=3903543>.

59. Beth Brelje, *Pocono Teens Charged in Murder Part of Juggalo Gang Known for Violent Rap*, POCONO REC. (Feb. 19, 2009), <http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20090219/NEWS/902190328/-1/news0924>.

60. Stacey Mulick, *Fort Steilacoom Unsafe at Night, Police Caution*, KNIGHT RIDDER TRIB. BUS. NEWS (Tacoma, WA), June 27, 2006, available at ProQuest, Doc. No. 463546250.

61. NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 23.

Seattle, a Juggalo was accused of stabbing a child who mocked the group,<sup>62</sup> as well as chasing a woman with a samurai sword.<sup>63</sup> In Oregon, two suspected Juggalos were charged with beating and robbing a homeless man.<sup>64</sup> This spate of crimes is proof to some that the Juggalos form some vast conspiracy, an enormous underground organization of criminals in clown make-up.<sup>65</sup>

These senseless, bizarre, sensational, “sporadic, disorganized, [and] individualistic”<sup>66</sup> crimes generate significant media attention, but should not be considered evidence that the Juggalos are a gang. There are hundreds of thousands of Juggalos; given the rates of violence in America, one must expect that, in a population that large, there will be a number of homicides.<sup>67</sup> Some have argued that the music of ICP has somehow created additional violence.<sup>68</sup> However, no number of random, individual acts committed by fans of the same musical act can transform those fans into a criminal gang.<sup>69</sup> The real question is whether all Juggalos can be considered a gang if individuals or small subsets of the group are engaging in “gang-like” activity. There are “thousands of Juggalos,” and “[n]aturally, a few are going to end up in trouble,” but this does not mean “the entire fan-base is part of a criminal structure.”<sup>70</sup>

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62. Levi Pulkkinen, *Charge: Kent Juggalo Stabbed Boy at Birthday Party*, SEATTLE POST-INTELLIGENCER (Sept. 8, 2013, 12:48 PM), <http://www.seattlepi.com/default/article/Charge-Kent-Juggalo-stabbed-boy-at-birthday-party-4793476.php>.

63. Levi Pulkkinen, *Prosecutor: Juggalo Chased Girlfriend's Lady Love with Sword*, SEATTLE POST-INTELLIGENCER (Sept. 26, 2013), <http://blog.seattlepi.com/seattle911/2013/09/26/prosecutor-sword-wielding-juggalo-chased-girlfriends-lady-love-with-sword/>.

64. Dave Itzkoff, *Insane Clown Posse Says It's Investigating F.B.I. Gang Report*, N.Y. TIMES (Aug. 13, 2012, 9:20 AM), <http://artsbeat.blogs.nytimes.com/2012/08/13/insane-clown-posse-says-its-investigating-f-b-i-gang-report/>.

65. *But see* Jesse Walker, *The Vast Juggalo Conspiracy*, REASON.COM (Oct. 28, 2011, 10:44 AM), <http://reason.com/blog/2011/10/28/the-vast-juggalo-conspiracy> (criticizing the National Gang Center's belief in some chimerical super-gang of Juggalos as a “familiar form of paranoia”).

66. NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 22.

67. Herendeen, *supra* note 31 (estimating the number of Juggalos at one million).

68. *See Nightline: Insane Clown Posse*, *supra* note 10.

69. In a classic case of the “no true Scotsman” fallacy, many Juggalos say that someone claiming to be a Juggalo who commits acts of violence is not a real Juggalo, because the crimes violate the core philosophy of the group. Guy, *supra* note 28 (quoting a young Juggalo, “Juggalos aren't bad . . . . Some people that claim to be a Juggalo are” (internal quotation marks omitted)); Meinzer, *supra* note 7 (quoting a Pennsylvania Juggalo, “Just because someone's out there doing something retarded and saying, ‘I'm a juggalo’ . . . they're not a juggalo. If you're a juggalo, you just kick back, you like the music. We don't want fights. We don't want all the drama” (internal quotation marks omitted)).

70. Smith, *supra* note 25.

For these reasons, few outside of law enforcement believe that the Juggalos constitute a gang.<sup>71</sup> To understand whether this majority view of the Juggalos is correct, it is necessary to define precisely what a gang is.

### III. SOCIAL SCIENCE DEFINITIONS OF THE GANG

Even relatively simple concepts can be difficult to define with the exactitude necessary for legal purposes. Courts have increasingly turned to dictionaries to provide meanings.<sup>72</sup> In the case of the gang, however, dictionaries offer little meaningful guidance.<sup>73</sup> Dictionaries generally define a gang as a collectivity that is “(1) marginal, (2) loosely organized, and (3) without a clear, social purpose.”<sup>74</sup> These purely negative definitions are too vague and merely express “bourgeois disapproval.”<sup>75</sup> Some positive, formal definition is necessary for effective anti-gang legislation.

In determining how the law should define a gang, it is unnecessary to begin *ex nihilo*. Social scientists have studied gangs for over a century; their research forms a valuable starting point.<sup>76</sup> Continued study seems to have obscured the issue of gang definition rather than solved it, however.<sup>77</sup> The controversy is intractable enough that some researchers

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71. Garcia, *supra* note 45 (“Are there ICP fans with awful tattoos that do terrible things? Yes. Does that mean they’re a gang? Unless they’re running the best, most secret con of all time, the answer is no.”).

72. Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 82 (2010). The U.S. Supreme Court in *Lanzetta v. New Jersey* specifically reviewed the use of dictionaries in the state court below construing the term gang in a New Jersey criminal statute. *Lanzetta v. New Jersey*, 306 U.S. 451, 453–56 (1939). The Court found that the definitions of gang in dictionaries and sociological research were “numerous and varied” and rejected the state court’s dictionary-based approach as deeply inadequate. *Id.* at 454, 458.

73. *Lanzetta*, 306 U.S. at 454–56.

74. Richard A. Ball & G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining “Gangs,”* 33 CRIMINOLOGY 225, 227 (1995).

75. *Id.* The definition of gang is malleable enough that there are distinct regional differences in use of the term. ARNOLD P. GOLDSTEIN ET AL., THE PROSOCIAL GANG: IMPLEMENTING AGGRESSION REPLACEMENT TRAINING 3–4 (1994).

76. This research should be the beginning, not the end, of a search for workable legal gang definitions, as sociological definitions cannot be directly adopted into law without significant changes. See Ball & Curry, *supra* note 74, at 227.

77. ROBERT J. FRANZESE ET AL., YOUTH GANGS 4 (2006); HOWELL, *supra* note 49, at 53; Rebecca D. Petersen, *Definitions of a Gang and Impacts on Public Policy, in UNDERSTANDING CONTEMPORARY GANGS IN AMERICA: AN INTERDISCIPLINARY APPROACH* 19, 23 (Rebecca D. Petersen ed., 2004).

have advocated eliminating the term gang entirely.<sup>78</sup> Other researchers have argued that the term is a pejorative, rarely used by gang members themselves, and that the concept is of limited utility.<sup>79</sup>

Early twentieth century studies of gangs, such as that of J. Adams Puffer or Frederic Thrasher, treat gangs as normal social groups of adolescent males.<sup>80</sup> Gang membership was considered a normal part of growing up in the modern city; Puffer estimated that 75% of all males in their early teens were gang members.<sup>81</sup> In these early sociologists' views, a gang was not intrinsically negative or positive.<sup>82</sup> Gangs might be a wellspring of criminal behavior or they might be a mere playgroup whose members go camping and fishing together.<sup>83</sup> To early theorists, criminality was not the defining feature of a gang.<sup>84</sup> In Thrasher's definition, the primary characteristic of a gang was its interstitial nature; it was most prominent geographically in between the commercial center of a city and its residential suburbs; demographically, it was made up of adolescents no longer boys but not yet fully adult.<sup>85</sup> A gang was distinctive from other organizations of young men due to its "spontaneous and unplanned origin"; its fairly intimate and face to face nature; that its main activity was a "mere loafing together,"<sup>86</sup> although it was also capable of collective action; that it had some tradition and group-awareness;<sup>87</sup> and finally that it was likely to have same attachment to a local territory.<sup>88</sup>

While twenty-first century gangs differ in some respects from the gangs of pre-war Chicago,<sup>89</sup> contemporary sociologists largely continue

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78. Ball & Curry, *supra* note 74, at 225 (citing CATHERINE H. CONLY ET AL., U.S. DEPT OF JUSTICE, STREET GANGS: CURRENT KNOWLEDGE AND STRATEGIES 6 (1993)).

79. *Id.* at 231 (quoting Robert A. Destro, *Gangs and Civil Rights*, in GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES 277, 278 (Scott Cummings & Daniel J. Monti eds., 1993)).

80. J. ADAMS PUFFER, THE BOY AND HIS GANG 8 (1912); *see generally* THRASHER, *supra* note 49.

81. PUFFER, *supra* note 80, at 8.

82. *Compare, e.g., id.* at 14–16 (describing the "Tennis Club" gang as "a thoroughly good gang, one of the best gangs I know"), *with id.* at 14–16 (depicting the "Dowser Glums" as "[a] tough gang," "distinctly evil").

83. *See id.* at 9.

84. *See* Ball & Curry, *supra* note 74, at 234–35.

85. *See id.* at 234; THRASHER, *supra* note 49, at 46.

86. THRASHER, *supra* note 49, at 50.

87. *Id.* at 55.

88. *Id.* at 57.

89. *See* C.E. PROWSE, DEFINING STREET GANGS IN THE 21ST CENTURY: FLUID,

to define gangs along similar lines.<sup>90</sup> Gang definitions are highly variable and often fairly complex. Ball and Curry propose a consensus definition:

The gang is a spontaneous, semisecret, interstitial, integrated but mutable social system whose members share common interests and that functions with relatively little regard for legality but regulates interaction among its members and features a leadership structure with processes of organizational maintenance and membership services and adaptive mechanisms for dealing with other significant social systems in its environment.<sup>91</sup>

While this definition is far too complex to apply in a real-world case, other sociological definitions are simpler. One of the most frequently cited definitions is that of Klein, who argues a gang is:

[A]ny denotable adolescent group of youngsters who (a) are generally perceived as a distinct aggregation by others in their neighborhood, (b) recognize themselves as a denotable group (almost invariably with a group name) and (c) have been involved in a sufficient number of delinquent incidents to call forth a consistent negative response from neighborhood residents and/or enforcement agencies.<sup>92</sup>

Klein's definition, neatly divided into three elements, seems to be parsed like a legal definition. However, two of its three elements ignore the attributes and actions of the gang itself and instead are based exclusively on the reactions of the "neighborhood" and law enforcement to the gang.<sup>93</sup> Troublesome youth are far more likely to be viewed as a gang if they are nonwhite, poor, or urban.<sup>94</sup> Klein's definition gives law enforcement carte blanche to designate any group a gang, as essentially any collectivity they believe is criminal *becomes* criminal merely through their suspicions.<sup>95</sup>

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MOBILE, AND TRANSNATIONAL NETWORKS 1, 7, 9 (2012). Compare NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 22, with *supra* notes 80–88 and accompanying text.

90. See *infra* notes 91–95 and accompanying text.

91. Ball & Curry, *supra* note 74, at 240.

92. MALCOLM W. KLEIN, STREET GANGS AND STREET WORKERS 13 (1971).

93. See *id.*; Ball & Curry, *supra* note 74, at 238.

94. Ball & Curry, *supra* note 74, at 236.

95. See *id.* at 238 (quoting KLEIN, *supra* note 92, at 13).

Rather than borrowing wholesale from one or another social science definition, a better policy may be to borrow individual factors from various social science definitions. There are a variety of factors regularly included in scientific definitions of gangs.<sup>96</sup> The most common factors social scientists use in classifying a group as a gang is the group's propensity towards criminality; the group's control of territory; the group's level of organization; the recurrent face-to-face interactions of members; a common name, insignia, colors, or other symbol of group awareness; and the age of group participants.<sup>97</sup>

The most common element in definitions of gang is an elevated level of violence, criminality, or delinquency in gang members.<sup>98</sup> Violence or criminality is included in 80% of the definitions evaluated by Robert Franzese.<sup>99</sup> Even within this near-ubiquitous factor, however, there is considerable variation. While some definitions require a commitment to criminality as a core purpose of a gang, others require only an increased rate of violence and delinquency.<sup>100</sup> Still others merely require a relaxed regard for legality.<sup>101</sup> The "universal finding" of gang research, however, is that gang members participate in more delinquent or criminal acts than non-gang members, and that the crimes committed by gang

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96. See *infra* Part III.

97. See *infra* Part III.

98. FRANZESE ET AL., *supra* note 77, at 4; CHESTER G. OEHME III, GANGS, GROUPS, AND CRIME: PERCEPTIONS AND RESPONSES OF COMMUNITY ORGANIZATIONS 50–51 (1997) (reporting violent crime as being included in 91.1% of forty-five gang definitions studied); RANDALL G. SHELDEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 127 (2d ed. 2012) (citing *Frequently Asked Questions about Gangs*, NAT'L GANG CTR., [www.nationalgangcenter.gov/about/FAQ#ql](http://www.nationalgangcenter.gov/about/FAQ#ql) (last visited May 6, 2014)); LEWIS YABLONSKY, GANGS IN COURT 36 (2005); Ball & Curry, *supra* note 74, at 232–33, 235; Ruth Horowitz, *Sociological Perspectives on Gangs: Conflicting Definitions and Concepts*, in GANGS IN AMERICA 37, 45 (C. Ronald Huff ed., 1990); Kristy N. Matsuda, *Juvenile Gangs and Delinquency*, in JUVENILE CRIME AND JUSTICE 117, 118 (William J. Chambliss ed., 2011); Petersen, *supra* note 77, at 23. Thrasher examined 1,313 gangs he found in 1927 Chicago and declared all but fifty-two of them as possibly or probably "demoralizing"; he, however, considered athletic, political, dancing, and billiards activities as "probably demoralizing." THRASHER, *supra* note 49, at 386. Only 40% of the gangs he examined were "definitely reported as delinquent or criminal." *Id.* Puffer's study found that 74% of gangs engaged in criminal activity. PUFFER, *supra* note 80, at 40.

99. FRANZESE ET AL., *supra* note 77, at 12–13. Howell rates criminal activity as included in approximately 80% of definitions. HOWELL, *supra* note 49, at 68–69 (updating Beth Bjerregaard, *Self-Definitions of Gang Membership and Involvement in Delinquent Activities*, 34 YOUTH & SOC'Y 31, 34–35 (2002)).

100. FRANZESE ET AL., *supra* note 77, at 12–13.

101. Ball & Curry, *supra* note 74, at 240.

members are more violent.<sup>102</sup> Criminal tendencies must be a part of any legal gang definition, as only crimogenic groups are a proper target for law enforcement.

However, an undue stress on violence has its own problems. By emphasizing criminality above all else, the positive qualities of gangs, such as friendship, community, and common interests, recognized by researchers as early as Puffer, are ignored.<sup>103</sup> In addition, if a gang is defined predominantly or exclusively by its criminality, the result is that almost any group where one or more persons commits a crime can be classified as a gang.<sup>104</sup> A helpful distinction has been proposed by some researchers: to become a gang, a group must not only be involved in “illegal activity,” but it is also required that that illegality is “part of [the gang’s] group identity.”<sup>105</sup> Unfortunately, inquiring into group identity, while helpful for social science researchers, seems beyond the ken of most law enforcement personnel.

A related element that appears in some gang definitions is the involvement in a specific category of crime: drug crime.<sup>106</sup> The requirement that a grouping be involved in drugs is fairly rare, appearing in a mere 10% of the definitions analyzed by Franzese.<sup>107</sup> Only definitions composed after 1990 include a drug crime component.<sup>108</sup> While many, especially in law enforcement, think of gangs and drugs as inseparable, this conclusion is not supported by

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102. Scott H. Decker & G. David Curry, *Juvenile and Youth Gangs*, in *ENCYCLOPEDIA OF CRIME & JUSTICE* 905, 907 (Joshua Dressler et al. eds., 2002).

103. PUFFER, *supra* note 80, at 8; Ball & Curry, *supra* note 74, at 232; Horowitz, *supra* note 98, at 44 (discussing the complexity of gang relations and research that indicates some gangs “have a positive relationship with their local communities and serve as a local police force” (citing MARTÍN SÁNCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY* 179, 184 (1991))).

104. See Ball & Curry, *supra* note 74, at 233.

105. FRANK M. WEERMAN ET AL., *EUROGANG PROGRAM MANUAL: BACKGROUND, DEVELOPMENT, AND USE OF THE EUROGANG INSTRUMENTS IN MULTI-SITE, MULTI-METHOD COMPARATIVE RESEARCH* 20 (2009) (quoting MALCOLM W. KLEIN & CHERYL L. MAXSON, *STREET GANG PATTERNS AND POLICIES* 4 (2006)). Knox addresses the problem of criminal members in a non-criminal group, using the example of a Boy Scout troop, and proposes that a group becomes a gang only where, “it exists for or benefits substantially from the continuing criminal activity of its members.” KNOX, *supra* note 49, at 6–7.

106. OEHME, *supra* note 98, at 50 (reporting drug crime as being included in 69.2% of forty-five gang definitions examined); YABLONSKY, *supra* note 98, at 36, 42–44; Ball & Curry, *supra* note 74, at 236.

107. FRANZESE ET AL., *supra* note 77, at 12–13.

108. *Id.*



evidence.<sup>109</sup> While many gang members are incidentally involved in drug distribution, they are generally dealing in pursuit of individual profit without any sort of corporate goal of advancing the gang.<sup>110</sup>

The second most common element in a gang definition is the control of or association with some geographic territory.<sup>111</sup> Thrasher included with each description of a gang its home territory; to him, a gang without territory was like a gang without a name or members.<sup>112</sup> Subsequent researchers have generally agreed with him; Franzese found 75% of the definitions studied included some requirement for territory or turf.<sup>113</sup> While this territory is an important element of most scientific definitions of a gang, it is entirely absent from statutory and most law enforcement definitions.<sup>114</sup> Some gang researchers have argued that the territorial model is passé, and the “new-age” gang is based upon social networks, fluidity, and the control of markets rather than control of territory.<sup>115</sup> The relative importance of claiming territory may have declined since Thrasher’s day, but possessing territory remains vital to most gangs’ “very existence.”<sup>116</sup>

Another important factor in gang definitions is that of organization.<sup>117</sup> Organization may be described variously as chain of

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109. See, e.g., Ric Curtis, *The Negligible Role of Gangs in Drug Distribution in New York City in the 1990s*, in GANGES AND SOCIETY: ALTERNATIVE PERSPECTIVES 41, 41–61 (Louis Kontos et al. eds., 2003).

110. L. Thomas Winfree, Jr. et al., *The Definition and Measurement of ‘Gang Status’: Policy Implications for Juvenile Justice*, 43 JUV. & FAM. CT. J. 29, 30 (1992). There are gangs, sometimes called “‘entrepreneurial’ gangs,” which form for the purpose of dealing and revolve around the drug trade. Jerome H. Skolnick, *Gangs and Crime Old as Time; but Drugs Change Gang Culture*, in THE MODERN GANG READER 222, 222–23 (Malcolm W. Klein et al. eds., 1995).

111. FRANZESE ET AL., *supra* note 77, at 4, 7; Ball & Curry, *supra* note 74, at 239; Horowitz, *supra* note 98, at 45; Matsuda, *supra* note 98, at 118; Kevin McDonald, *Marginal Youth, Personal Identity, and the Contemporary Gang: Reconstructing the Social World?*, in GANGES AND SOCIETY: ALTERNATIVE PERSPECTIVES, *supra* note 109, at 62, 65–67; Petersen, *supra* note 77, at 23.

112. THRASHER, *supra* note 49, at 57, 126.

113. FRANZESE ET AL., *supra* note 77, at 12–13.

114. See, e.g., CAL. PENAL CODE § 186.22(f) (West 1999 & Supp. 2014).

115. See PROWSE, *supra* note 89, at 7, 17.

116. HOWELL, *supra* note 49, at 57.

117. FRANZESE ET AL., *supra* note 77, at 12–13 (including “organization” in 60% of definitions analyzed); HOWELL, *supra* note 49, at 68–69 (including “organization” in 60% of definitions analyzed); SHELDEN, *supra* note 98, at 127 (citing *Frequently Asked Questions about Gangs*, *supra* note 98); Ball & Curry, *supra* note 74, at 240; Horowitz, *supra* note 98, at 46 (discussing the pros and cons of requiring a group to have some formal organization to be considered a gang); Matsuda, *supra* note 98, at 118; see also OEHME, *supra* note 98 at 46–47

command or division of roles; the level of organization required is generally rather low, described as “loose-knit” or moderate.<sup>118</sup> Thrasher, for example, viewed the level of organization present in a typical gang to be superior to that of a mob, but qualitatively similar to it.<sup>119</sup> Most studies of gangs fail to find that there is anything like highly structured organization or institutional goals.<sup>120</sup> However, gangs generally have some *de minimis* organization, and the more highly organized a gang is, the greater the rate and seriousness of criminality associated with that gang.<sup>121</sup> A related requirement is that of identifiable leadership.<sup>122</sup> Gangs are often proto-democratic, and although “[n]atural leaders” arise<sup>123</sup> inevitably, a formal, identifiable leadership requirement in gangs is relatively rare.<sup>124</sup> The National Gang Center has rated identifiable leadership as the least relevant factor in defining a group as a gang.<sup>125</sup> However, while the level of organization associated with many gangs is minimal, those gangs that have more formal, complex structure are those that should be of greater interest to law enforcement.<sup>126</sup> Some organizational requirement should be included in legal gang definitions.

Thrasher required that a gang have “intimate face-to-face relations.”<sup>127</sup> Roughly half<sup>128</sup> of the social science definitions of gangs require that the members have some “recurrent interaction” or “continuous meetings.”<sup>129</sup> Law enforcement definitions of gang also include this element with some frequency.<sup>130</sup> Related to this element is

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(listing studies that have taken various stances on the organizational requirement).

118. OEHME, *supra* note 98, at 47.

119. THRASHER, *supra* note 49, at 53.

120. See Decker & Curry, *supra* note 102, at 908.

121. HOWELL, *supra* note 49, at 70.

122. THRASHER, *supra* note 49, at 30; Ball & Curry, *supra* note 74, at 232.

123. THRASHER, *supra* note 49, at 30.

124. FRANZESE ET AL., *supra* note 77, at 12–13. Franzese rates the leadership requirement as occurring in only 30% of definitions. *Id.*

125. SHELDEN, *supra* note 98, at 127 (citing *Frequently Asked Questions about Gangs*, *supra* note 98).

126. See *supra* notes 120–21 and accompanying text.

127. THRASHER, *supra* note 49, at 50.

128. Franzese scores this requirement as included in 50% of definitions. FRANZESE ET AL., *supra* note 77, at 12–13.

129. OEHME, *supra* note 98, at 51 (reporting that 50.2% of gang definitions studied required that gang members “[r]eside in [s]ame [l]ocale”); YABLONSKY, *supra* note 98, at 36; Ball & Curry, *supra* note 74, at 232.

130. FRANZESE ET AL., *supra* note 77, at 13.

that of size; clearly, one person cannot constitute a gang, and if a gang grows large enough, recurrent interaction between gang members becomes impossible. However, a minimum or maximum size for a gang is entirely absent from almost all social science definitions of gangs.<sup>131</sup>

More than half of the social science definitions examined by Franzese included a requirement that a gang have a name or insignia.<sup>132</sup> Other definitions require that a gang have some unifying colors or mode of dress.<sup>133</sup> If a gang grows to the point that members do not know each other, colors or other visual short hand becomes the only method for gang members to identify one another.<sup>134</sup> While gang colors are indisputably of great value for these large gangs, they should not be considered necessary or even helpful for smaller gangs.

A final common factor in gang definitions is the age of gang members.<sup>135</sup> Thrasher and Puffer explicitly conceived of a gang as a group of boys and young men; while perhaps a young man with arrested development may be included in a gang without definitional problems, a gang of adults was a contradiction in terms.<sup>136</sup> Today, researchers estimate that 80% or 90% of gang members are between the ages of fourteen and nineteen.<sup>137</sup> Although the age at which gang participation peaks varies depending on the location, time, and methodology, it is clear that by the early to mid-twenties, gang membership is rare.<sup>138</sup> Research generally agrees gang membership is most common in males from fourteen to sixteen, at which point almost all members tend to age out of the gang lifestyle.<sup>139</sup>

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131. *Id.* at 12–13; SHELDEN, *supra* note 98, at 127 (citing *Frequently Asked Questions about Gangs*, *supra* note 98). Howell argues that a minimum size of three is implicit in most gang definitions, and advocates a minimum size of five members for a practical gang definition. HOWELL, *supra* note 49, at 70, 72.

132. FRANZESE ET AL., *supra* note 77, at 12–13.

133. *Id.*

134. Shawn Booth, *Gang Symbols*, in *ENCYCLOPEDIA OF GANGS* 74, 74 (Louis Kontos & David C. Brotherton eds., 2008).

135. SHELDEN, *supra* note 98, at 127 (citing *Frequently Asked Questions about Gangs*, *supra* note 98); Ball & Curry, *supra* note 74, at 235.

136. PUFFER, *supra* note 80, at 8; THRASHER, *supra* note 49, at 46. Thrasher considered as “fairly typical” a gang of sixteen- to twenty-two-year-old males. *Id.*

137. FRANZESE ET AL., *supra* note 77, at 21–23. The National Gang Center considers the consensus age for gang membership to be between twelve and twenty-four. *Frequently Asked Questions about Gangs*, *supra* note 98.

138. FRANZESE ET AL., *supra* note 77, at 21–23.

139. *Id.*

Under these social science factors, the Juggalos are not a gang. The Juggalos do have a name to describe their group, as well as common dress and symbols.<sup>140</sup> In addition, there are some indications that Juggalos commit criminal acts.<sup>141</sup> It is not at all clear, however, that an average Juggalo commits more crimes than would be expected of a non-gang affiliated person of similar age.<sup>142</sup> In addition, Juggalos control no territory of appreciable size (unless one counts milling in mall parking lots).<sup>143</sup> The Juggalos have no leadership, no real organization, no chain of command, and lack even a division of roles of any type.<sup>144</sup> At a national or regional level, even the loose cohesion that is expected of a gang is completely lacking for the Juggalos.<sup>145</sup> The National Gang Threat Assessment alleges that “open source reporting suggests that a small number of Juggalos are forming more organized subsets.”<sup>146</sup> Assuming this is true, the fact that there are small numbers of organized Juggalos indicates that there are Juggalos who are also gang members, not that all Juggalos make up a gang. Finally, many Juggalos are far older than typical gang members.<sup>147</sup>

Therefore, most social scientists would not consider the Juggalos a gang. They may have a common name, mode of dress, and have been associated with the commission of crimes, but that also describes the Green Bay Packers or the Milwaukee Police Department. Unlike those

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140. *See infra* Part III.

141. NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 22. The National Gang Intelligence Center's report asserts, without elaboration, “many Juggalos subsets exhibit gang-like behavior and engage in criminal activity and violence.” *Id.* The report cites two crimes, a non-fatal shooting by a “suspected Juggalo” and an assault and robbery perpetrated by “two suspected Juggalo[s]” a year apart. *Id.* at 23. Assuming Juggalos committed these crimes, the perpetrators represent such an infinitesimal fraction of the Juggalo population as to make these two crimes entirely meaningless as to the criminality of Juggalos overall. Herendeen, *supra* note 31 (estimating the number of fans at one million).

142. *See* Garcia, *supra* note 45.

143. *See* Cizmar, *supra* note 3.

144. The National Gang Intelligence Center describes the Juggalos as “loosely-organized,” and also as being defined by “disorganization and [a] lack of structure within their groups,” which seems an accurate description of most Juggalos. NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 22–23. Specific gangs of Juggalos, however, may have actual organization. For example, the Big Money Hustlas, a Juggalo gang in Sheybogan, Wisconsin, has a “member handbook” describing different ranks and duties for gang members and associates. WIS. DEP'T OF JUSTICE, NORTHWEST WISCONSIN GANG ASSESSMENT 58 (2008).

145. *Id.*

146. *Id.*

147. *See* THRASHER, *supra* note 49, at 46; Lomax, *supra* note 15.

groups, the Juggalos lack a territory or any sort of organization that marks gangs in most social science contexts. Almost everyone outside of law enforcement immediately recognized that the Juggalos were not a gang, and to suggest they were was comical.<sup>148</sup> As we have seen, under any social science definition, the Juggalos should not be considered a gang either. Why then do some law enforcement agencies, including the FBI, persist in their belief that the group is a criminal organization?

#### IV. POLICE DEFINITIONS OF GANGS TEND TO BE EXTREMELY PERMISSIVE

The nuanced definitions of gang in the scientific literature stand in stark contrast to the vague definitions generally used by police departments. Like Humpty-Dumpty, when police use the term “gang,” “it means just what [they] choose it to mean—neither more nor less.”<sup>149</sup> Some of the difference can readily be explained by a difference in focus; while sociologists and anthropologists are deeply interested in the social phenomenon of the gang, whether its members commit crimes or not, the criminal justice system concerns itself only with “criminal” or “delinquent” gangs.

The Los Angeles Police Department’s (LAPD) definition of a criminal street gang is quite broad; it is defined as “a group of people who form an allegiance for a common purpose and engage in violent, unlawful, or criminal activity.”<sup>150</sup> The National Gang Intelligence Center defines street gangs as any “criminal organizations formed on the street.”<sup>151</sup> The U.S. Department of Justice, in its National Youth Gang Survey, essentially leaves the definition of gang up to the respondents; it instructs law enforcement agencies that a youth gang is “[a] group of youths or young adults in your jurisdiction that you or other responsible persons in your agency or community are willing to identify or classify as a ‘gang.’”<sup>152</sup>

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148. See *supra* note 71 and accompanying text.

149. See LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE*, in *THE ANNOTATED ALICE: ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS* 166, 269 (Martin Gardner ed., Penguin Books rev. ed. 1970) (internal quotation marks omitted).

150. *Gang Awareness*, L.A. POLICE DEP’T, [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/23467](http://www.lapdonline.org/get_informed/content_basic_view/23467) (last visited May 7, 2014); see also Winfree, Jr. et al., *supra* note 110, at 30 (discussing a previous definition of “gang” used by the LAPD).

151. NAT’L GANG INTELLIGENCE CTR., *supra* note 1, at 7.

152. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 645 (2011) (quoting ARLEN EGLEY, JR. ET AL.,

The police definitions of gang appear designed to allow law enforcement unlimited discretion to collect information about citizens under the aegis of anti-gang programs. This may be an excusable position taken for the benefit of crime prevention, were it not for the troubling purposes to which police gang databases are routinely put and the lack of oversight of those databases.<sup>153</sup> Natural experiment has shown that the more permissive the requirements are for entering an individual into a gang database, the more racial disparity exists in the database.<sup>154</sup>

Given the almost unlimited discretion accorded to law enforcement to classify a group as a gang under existing law enforcement definitions, the Juggalos can be considered a gang.<sup>155</sup> Some police seem to classify Juggalos as a gang based on loitering and other minor offenses only.<sup>156</sup> An anti-gang police officer in Fresno acknowledged that Juggalos in his area had “nowhere near” the violence of other area gangs and were involved only in “occasional disturbances” near a local mall and a shopping center.<sup>157</sup> He cited involvement of Juggalos in violent crimes elsewhere in the country, the “anti-establishment, violent and hardcore” lyrics of ICP, and the possibility of the group becoming more dangerous in the future as justifying their classification as a gang.<sup>158</sup> Definitions like this tend to depend on the subjective views of law enforcement, and those views tend to be unkind towards Juggalos. This may explain why Juggalos have been declared a gang nationally<sup>159</sup> and by at least four states.<sup>160</sup> It should be noted, however, that many current and former law enforcement officers disagree with classification of the

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U.S. DEP'T OF JUSTICE, NATIONAL YOUTH GANG SURVEY: 1999–2001, at 4 (2006)). Law enforcement agencies have been accused of “broaden[ing] or narrow[ing]” the gang concept in order to suit “their own needs and interests.” Horowitz, *supra* note 98, at 43.

153. See Howell, *supra* note 152, at 636–39.

154. *Id.* at 653–54. It should also be an area of concern that law enforcement ideas about gangs frequently are derived from warped media accounts rather than personal experience or academic study. See DAN KOREM, SUBURBAN GANGS: THE AFFLUENT REBELS 31 (1994).

155. Smith, *supra* note 25 (noting that “law enforcement officials across the country” consider the Juggalos an “emerging gang”).

156. See, e.g., Guy, *supra* note 28.

157. *Id.* (internal quotation marks omitted).

158. *Id.* (internal quotation marks omitted).

159. NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 22.

160. *Id.*; State v. Chepurko, 152 Wash. App. 1022 (2009) (unpublished opinion) (mentioning the Juggalos as a gang in the state of Washington).

Juggalos as a gang.<sup>161</sup> One former FBI agent analogized blaming all Juggalos for a single crime as “like trying to hang a bank robbery on the president because somebody wearing a face mask in his likeness perpetrated the crime.”<sup>162</sup> Legislators and the judiciary have failed to act to restrain law enforcement’s internal, vague gang definitions that allow law enforcement to categorize virtually any group as a criminal organization. In fact, the gang definitions in statutes are almost as permissive.

### V. LEGISLATIVE GANG DEFINITIONS

Legislative efforts at criminalizing gangs are almost as old as sociological study of the phenomenon. In 1934, New Jersey passed a law that criminalized membership in a “gang consisting of two or more persons” when a person was “not engaged in any lawful occupation” and had been convicted in the past of “any crime.”<sup>163</sup> The statute declared that a “gangster” was “an enemy of the State” and provided that the crime be punished by up to a twenty-year prison sentence and a \$10,000 fine.<sup>164</sup>

The New Jersey law was ruled unconstitutional in 1939.<sup>165</sup> The U.S. Supreme Court reasoned that, as the word gang was undefined, modified only by the phrase “consisting of two or more persons,” and the Court could find no other statute criminalizing gang membership, recourse to dictionaries and historical and sociological writings was necessary to define the term.<sup>166</sup> The Court noted that the dictionary definitions used by the lower court defined a gang as a group of persons “acting together for some purpose, ‘usually criminal’” and therefore would include some gangs acting towards a commendable purpose.<sup>167</sup> Based on the statute’s dependency on terms “so vague, indefinite, and uncertain,” the Court ruled “it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.”<sup>168</sup>

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161. Smith, *supra* note 25.

162. *Id.*

163. Act of May 7, 1934, ch. 155, § 4, 1934 N.J. Laws 394, 394, *declared unconstitutional* by *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

164. *Id.* §§ 4–5, 1934 N.J. Laws at 394–95.

165. *Lanzetta*, 306 U.S. 458.

166. *Id.* at 452–55 (quoting § 4, 1934 N.J. Laws at 394) (internal quotation marks omitted).

167. *Id.* at 457.

168. *Id.* at 458.

The modern era of anti-gang statutes began with the passage of the California Street Terror Enforcement and Protection Act (STEP Act) in 1988.<sup>169</sup> State legislatures and Congress have since 1988 passed a litany of anti-gang measures.<sup>170</sup> By 2013, every state and the federal government enacted some anti-gang measure.<sup>171</sup> Legislators have often had as much trouble as social scientists in coming up with a workable gang definition.<sup>172</sup> Only forty-two states define gang by statute, leaving the remainder of states with gang-related legislation to depend on some common understanding definition.<sup>173</sup> However, like law enforcement definitions, legislative definitions of gangs are predicated on a belief that gangs are usually “highly disciplined criminal organizations.”<sup>174</sup> Like the statute in *Lanzetta*, these state acts have been attacked as vague, but the courts have yet to overturn a state gang statute based on its inadequate definition of gang.<sup>175</sup>

A large part of the problem with the lawmakers creating anti-gang statutes is that they acted out of fear and ignorance, rather than a studied analysis of the problem.<sup>176</sup> Legislatures increased criminal penalties and created new crimes for those they viewed as gang

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169. Street Terrorism Enforcement and Prevention Act, ch. 1242, § 1, 1988 Cal. Stat. 4127 (codified at CAL. PENAL CODE §§ 186.20–27 (West 1999 & Supp. 2014)); Street Terrorism Enforcement and Prevention Act, ch. 1256, § 1, 1988 Cal. Stat. 4179 (codified at CAL. PENAL CODE §§ 186.20–27).

170. *Highlights of Gang-Related Legislation*, NAT’L GANG CENTER., <http://www.nationalgangcenter.gov/Legislation/Highlights> (last updated Dec. 2013).

171. *Id.*

172. Beverly Petersen Jennison, *Revisiting Eve’s Law: Suggestions for Improving the North Carolina Anti-Gang Statute*, 88 N.C. L. REV. 1995, 2002 n.25 (2010) (explaining that the Governor’s Crime Commission studied the gang problem for some ten years before the passage of the state’s anti-gang statute, stymied in part by “the lack of a standardized definition of what constitutes these sociological entities” (quoting GOVERNOR’S CRIME COMM’N, N.C. DEP’T OF CRIME CONTROL & PUB. SAFETY, GANGS IN NORTH CAROLINA: THE 2010 REPORT TO THE GENERAL ASSEMBLY 1 (2010), available at <https://www.ncdps.gov/div/gcc/pdfs/pubs/2010gangreport.pdf>) (internal quotation marks omitted)).

173. *Highlights of Gang-Related Legislation*, *supra* note 170.

174. See David R. Truman, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 706 (1995).

175. Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 39–41 (1998) (listing cases). It should be noted that two municipal anti-gang measures have been struck down. *Id.* at 41.

176. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 108 (2002) (“[L]egislators often act without understanding gangs very well.” (citing Louis Holland, *Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-Gang Legislation*, 21 J. CONTEMP. L. 259, 279 (1995))).



members without a fundamental understanding of what a gang is and why individuals join and participate in gangs.<sup>177</sup> Governmental response to gangs is generally uninformed, usually spurred by some catalytic event, and is followed by a hysterical reaction and over-reliance on coercive law enforcement tactics rather than treating the socio-economic roots of the gang problem.<sup>178</sup> The STEP Act and other anti-gang measures were more of a product of a general moral panic about youth and street crime than careful study of the gang phenomenon.<sup>179</sup> The overall effect has been to create not only overly broad anti-gang legislation that applies to innocent groups but also legislation viewed by many prosecutors as an ineffective weapon against gang violence.<sup>180</sup>

*A. The California Gang Definition: The STEP Act and Its Interpretation*

While it may be expected that the large number of different state statutes would have resulted in a large number of competing definitions, the states have largely parroted the definitions in the STEP Act.<sup>181</sup> The STEP Act created both a substantive crime, of active participation in a criminal street gang, and a sentence enhancement that applies where a crime was committed “for the benefit, at the direction of, or in association with a criminal street gang.”<sup>182</sup> It provides that:

“criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more . . . [enumerated criminal acts],

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177. Scott Decker & Kimberly Kempf-Leonard, *Constructing Gangs: The Social Definition of Youth Activities*, in THE MODERN GANG READER, *supra* note 110, at 14, 15 (citing many works that criticize both the media and policymakers' viewpoints on gangs as “distorted” and noting the fact that policymakers' dependence on warped media narratives worsens the problem of confusing and inadequate gang definitions in public policy); Petersen, *supra* note 77, at 20 (criticizing the current gang policy-making process as ineffectual and anti-democratic).

178. C. Ronald Huff, *Denial, Overreaction, and Misidentification: A Postscript on Public Policy*, in GANGS IN AMERICA, *supra* note 98, at 310, 310–13.

179. See Michael Welch, *Moral Panic, Denial, and Human Rights: Scanning the Spectrum from Overreaction to Underreaction*, in CRIME, SOCIAL CONTROL AND HUMAN RIGHTS 92, 94–95 (David Downes et al. eds., 2007) (discussing moral panic over street and youth crime in the early 1990s).

180. Some research indicates that anti-gang statutes are simply ignored by prosecutors in many jurisdictions, who instead rely on convicting gang members of simpler traditional crimes. Strosnider, *supra* note 176, at 108.

181. Bjerregaard, *supra* note 175, at 32.

182. CAL. PENAL CODE § 186.22(b) (West 1999 & Supp. 2014).

having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>183</sup>

This section has been interpreted to require “substantial evidence”<sup>184</sup> to support a finding of three elements regarding a group before it is a criminal street gang:

(1) that there be an “ongoing” association involving three or more participants, having a “common name or common identifying sign or symbol”; (2) that the group has as one of its “primary activities” the commission of one or more specified crimes; and (3) the group’s members either separately or as a group “have engaged in a pattern of criminal gang activity.”<sup>185</sup>

Normally inadmissible evidence may be produced to establish these three elements.<sup>186</sup>

These elements contain a great deal of ambiguity, but something is immediately obvious: almost all of the common sociological dimensions of gangs are ignored outright in this statutory definition. The second most important factor, territory, is nowhere to be seen. There is likewise no mention of gang members’ ages or the type of organization of the gang. The first element requires that a gang be an association and that it have some name, sign, or symbol, but the rest of the definition concerns itself exclusively with criminality.

#### 1. The First STEP Act Element: Organization, Size, and a Common Name or Symbol

The first element of the definition contains three sub-requirements: that the gang be “any ongoing organization, association, or group”; that the gang have “three or more persons”; and that the gang has a

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183. *Id.* § 186.22(f).

184. *People v. Jose T.*, 282 Cal. Rptr. 75, 79 (Ct. App. 1991). Evidence is considered substantial when it is “reasonable, credible, and of solid value.” *People v. Frank S.*, 46 Cal. Rptr. 3d 839, 841 (Ct. App. 2006).

185. *People v. Vy*, 19 Cal. Rptr. 3d 402, 411 (Ct. App. 2004) (quoting *People v. Gardeley*, 927 P.2d 713, 724 (Cal. 1996)). Some cases imply that elements one and two establish that a criminal street gang exists, and element three is required only in order to establish the street gang sentence enhancement, not the existence of the gang itself. *See People v. Hernandez*, 94 P.3d 1080, 1082 (Cal. 2004). This appears to be a distinction without a difference.

186. *Hernandez*, 94 P.3d at 1085.

“common name or common identifying . . . symbol.”<sup>187</sup> The ongoing association requirement requires only that the putative gang existed at the time of the crime.<sup>188</sup> Gangs usually have very little organizational structure.<sup>189</sup> While there is no statutory definition of gang membership,<sup>190</sup> the only size requirement the STEP Act imposes is that there are three “persons” rather than three members.<sup>191</sup> In addition, the STEP Act does not require that a defendant be a gang member to be subject to the sentence enhancement, or even that the individual devote a substantial part of his time to the gang, only that he “actively participate[]”.<sup>192</sup>

The final part of the first element is that the gang has some common name or identifying symbol.<sup>193</sup> This requirement does not mean that the gang has to have a single name; multiple names are allowed provided that at least one name is common to all the gang’s members.<sup>194</sup> Although gangs frequently identify themselves through certain colors, distinctive clothing, or graffiti tags, none of these factors are required for a group of people to be found a criminal street gang.<sup>195</sup>

The first element of California’s criminal street gang definition is very easy to prove. It may be established exclusively from the hearsay

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187. CAL. PENAL CODE § 186.22(f); *see also* Vy, 19 Cal. Rptr. 3d at 411 (quoting *Gardeley*, 927 P.2d at 724).

188. *People v. Nathaniel C.*, 279 Cal. Rptr. 236, 243 (Ct. App. 1991).

189. Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 431 (1999).

190. *See* CAL. PENAL CODE § 186.22. Nor is the term “gang member” defined elsewhere in the California Penal Code. Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 BERKLEY J. CRIM. L. 101, 106 (2006). Some other states’ gang statutes do define gang membership. *See*, for example, ARIZ. REV. STAT. ANN. § 13–105(9) (2010 & Supp. 2013), or the definition of a “criminal gang associate” contained in FLA. STAT. ANN. § 874.03(2) (West Supp. 2013). The California Supreme Court has held that to be found an “active participant” in a criminal street gang, the prosecution must prove all of the elements of the substantive crime of active gang participation contained in section 186.22(a) of the California Penal Code. *People v. Robles*, 5 P.3d 176, 182 (Cal. 2000) (citing CAL. PENAL CODE § 186.22(a)).

191. CAL. PENAL CODE § 186.22(f).

192. *Id.* § 186.22(a); *see also* *People v. Bragg*, 75 Cal. Rptr. 3d 200, 212 (Ct. App. 2008) (rejecting the defendant’s contention that there was insufficient evidence he was still a gang member at the time of the crime, and noting that there is no requirement that the defendant be a current or active gang member for the sentence enhancement to apply).

193. CAL. PENAL CODE § 186.22(f).

194. *People v. Nathaniel C.*, 279 Cal. Rptr. 236, 243 (Ct. App. 1991).

195. *Id.*

“gang expert” testimony of a law enforcement officer.<sup>196</sup> As long as the gang has some basic level of organization, there are three “participants,” and someone refers to the group by a name or symbol, the element is satisfied. Every formal or informal organization imaginable, from a nuclear family or lady’s knitting circle to the People’s Liberation Army, would satisfy the first element. The inability of this element to distinguish between criminal organizations and all other organizations makes it essentially meaningless.

The Juggalos satisfy this first element as well. While the Juggalos have no hierarchy, command structure, or formal leadership, they probably meet the rather low bar of being an “ongoing organization, association, or group.”<sup>197</sup> Nationally, there are hundreds of thousands of Juggalos; hence, the second requirement that the group have three or more members is also satisfied.<sup>198</sup> Finally, the Juggalos have both a name and identifying symbols. Like nearly all groups with a very minimal level of organization, the Juggalos satisfy all requirements of the first element of a criminal street gang under the STEP Act.

## 2. The Second STEP Act Element: “Primary Activity”

The second element required to prove that a group is a criminal street gang is that one of the group’s “primary activities” is the commission of one or more crimes enumerated in section 186.22(e) of the California Penal Code.<sup>199</sup> Originally, there were seven “serious”<sup>200</sup> enumerated crimes.<sup>201</sup> The list of enumerated crimes has expanded over

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196. *People v. Cervantez*, No. F037467, 2002 WL 31425010, at \*19 (Cal. Ct. App. Oct. 30, 2002).

197. *See* CAL. PENAL CODE § 186.22(f).

198. Herendeen, *supra* note 31 (estimating the number at one million).

199. CAL. PENAL CODE § 186.22(f). The STEP Act does not require that the gang have an unlawful purpose, an element that the Supreme Court required in *Scales v. United States* for “any law punishing association with a subversive group.” Baker, *supra* note 190, at 116 (citing *Scales v. United States*, 367 U.S. 203, 228 (1961)). One could argue the second and third elements of the definition satisfy this requirement, but as we shall see these elements have been interpreted rather broadly.

200. Baker, *supra* note 190, at 114 (quoting CAL. S. COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, Rec. No. 29069, 1987–1988 Reg. Sess., at 4).

201. Street Terrorism Enforcement and Prevention Act, ch. 1242, § 1, 1988 Cal. Stat. 4127, 4128–29 (codified at CAL. PENAL CODE § 186.22(e) (West 1999)); Street Terrorism Enforcement and Prevention Act, ch. 1256, § 1, 1988 Cal. Stat. 4179, 4180–81 (codified at CAL. PENAL CODE § 186.22(e)). These crimes were assault with a deadly weapon, robbery, unlawful homicide or manslaughter, narcotics trafficking, shooting at an inhabited dwelling or occupied vehicle, arson, and witness intimidation. Ch. 1242, § 1, 1988 Cal. Stat. at 4128–29; ch. 1256, § 1, 1988 Cal. Stat. at 4180–81.

time; today there are twenty-eight crimes that can satisfy the “primary activities requirement.”<sup>202</sup> Almost all gangs have principal activities identical to that of “other popularly accepted adolescent friendship groupings—partying and ‘hanging out.’”<sup>203</sup> The primary activity requirement, however, ignores this and concentrates on individual instances of criminality to the exclusion of all of a gang’s other activities.<sup>204</sup>

In *People v. Gamez*,<sup>205</sup> the defendant attacked the overbreadth of the STEP Act’s gang definition, specifically citing the fact that LAPD officers or environmental activists commit many of the enumerated crimes.<sup>206</sup> The defendant asserted that the STEP Act’s definition of gang in fact applied to “any group whose *individual members* may commit criminal offenses.”<sup>207</sup> Gamez asserted that the definition of gang was therefore impermissibly overbroad, violating the First Amendment freedom of association.<sup>208</sup>

The California Court of Appeals rejected this argument; it specifically cited the “primary activity” requirement of the STEP Act as preventing the definition from being overbroad despite the extremely loose strictures of the first element.<sup>209</sup> The *Gamez* court found that the STEP Act’s gang definition required that “one of the primary activities

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202. CAL. PENAL CODE § 186.22(e)–(f). The added crimes include discharging a firearm from a moving vehicle; grand theft; grand theft of a firearm; burglary; rape; looting; money laundering; kidnapping; mayhem; aggravated mayhem; torture; felony extortion; felony vandalism; carjacking; sale, delivery, or transfer of a firearm; possession of a pistol or revolver capable of being concealed on the person; threats to cause death or great bodily injury; theft and unlawful taking of a vehicle; possession of a firearm; carrying a concealed firearm; and carrying a loaded firearm. *Id.*

203. Werdegarr, *supra* note 189, at 431–32. Klein encapsulated typical gang life as, “do[ing] very little—sleep, get up late, hang around, brag a lot, eat again, drink, hang around some more. It’s a boring life; the only thing that is equally boring is being a researcher watching gang members.” HOWELL, *supra* note 49, at 39 (quoting MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* 11 (1995)) (internal quotation marks omitted). In this aspect of “gang life,” at least, gangs and the Juggalos are similar. A nineteen-year-old Fresno Juggalo said, “[t]he only thing we do is loiter.” Guy, *supra* note 28 (internal quotation marks omitted).

204. Howell, *supra* note 152, at 645 (“To attribute to gangs the objective purpose to commit particular crimes is to ignore the reality of most gangs.” (citing KLEIN, *supra* note 203, at 86)).

205. *People v. Gamez*, 286 Cal. Rptr. 894 (Ct. App. 1991).

206. *Id.* at 901.

207. *Id.*

208. *Id.*

209. *Id.*

of the group or association itself be the commission of crime” and that one was free to associate with anyone under the Act unless the association was for the “purpose of promoting, furthering, or assisting” the commission of crime.<sup>210</sup> The court therefore dismissed the analogy to the LAPD or environmental activists as chimerical, as those groups did not have the commission of an enumerated offense as a “primary activity”; because the threat to free association was not real or substantial, the *Gamez* court rejected the defendant’s arguments.<sup>211</sup>

The California Supreme Court in *People v. Sengpadychith*<sup>212</sup> elaborated on the primary activities requirement, ruling it requires that the prosecution establish that members of the gang have “consistently and repeatedly” committed one or more of the enumerated crimes, and that commission of the enumerated crimes was “one of the group’s ‘chief’ or ‘principal’ occupations.”<sup>213</sup> However, *Sengpadychith* also held the requirement may be satisfied by evidence of such consistent and repeated criminal activity by gang members *or* by a law enforcement officer, testifying as a gang expert, simply expressing his opinion that one or more enumerated crimes is a primary activity of a group.<sup>214</sup> Provided that the expert has some basis for his opinion other than

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210. *Id.* (emphasis omitted).

211. *Id.*

212. *People v. Sengpadychith*, 27 P.3d 739 (Cal. 2001).

213. *Id.* at 744 (emphasis omitted).

214. *Id.*; *People v. Gardeley*, 927 P.2d 713, 722 (Cal. 1996). The few cases in which the primary activities requirement was not satisfied usually did not include such expert testimony about the primary activity of the gang. *See, e.g.*, *People v. Perez*, 12 Cal. Rptr. 3d 821, 828 (Ct. App. 2004). In *Perez*, the defendant was alleged to be a member of a Latino gang and to have shot a member of a rival Asian gang. *Id.* at 825. At trial, a detective cited a beating of an Asian six years before by members of the same gang and shootings of Asian men some weeks before the crime by unknown assailants. *Id.* at 826. The court rejected this evidence as sufficient to prove that enumerated crimes were a consistent and repeated activity of group members. *Id.* at 827. The court cited a lack of expert testimony similar to that in *Gardeley*, where a police gang expert asserted that an enumerated crime was a primary activity of the gang. *Id.* at 827–28. A similar result was reached in *People v. Alexander L.*, where a police gang expert, when asked about the primary activities of the gang defendant was alleged to be a member of, testified that he knew the gang was involved in certain enumerated crimes without any specifics. *People v. Alexander L.*, 57 Cal. Rptr. 3d 226, 230–31 (Ct. App. 2007). The court ruled that without specifics, it was impossible to tell if the expert testimony was reliable, and ruled that the primary activities requirement was not proven. *Id.* at 231. These cases impose only a very mild requirement that the prosecution elicit testimony that the gang is engaged in certain crimes and about the witness’s base of knowledge, which in *Gardeley* was the officer’s talking to gang members and his colleagues. *See id.* at 231–32.

unidentified hearsay declarants, the gang expert's opinion about the gang's primary activity will be enough to establish the element.<sup>215</sup>

Overall, the "standard of proof adopted by the Supreme Court for [the primary activities element] is greatly relaxed."<sup>216</sup> Convictions or proof beyond a reasonable doubt are unnecessary; the only requirement is that testimony about the gang's primary activity is "credible."<sup>217</sup> Rather than emphasizing the purpose of a group or an individual's intent in associating with it, the only thing that the courts have examined in satisfying the primary activities requirement is the number of crimes committed by gang members.<sup>218</sup> It is permissible for the charged crime to be considered as part of the "primary activity" analysis.<sup>219</sup> In addition, there is no requirement that previous crimes used to establish "primary activity" be gang-related in any way.<sup>220</sup>

Courts readily find that crimes are a primary activity of a group on rather thin evidence. In *People v. Vy*,<sup>221</sup> the defendant was a member of a small street gang called the Young Asians (YA).<sup>222</sup> YA existed for two years apparently without any criminal activity.<sup>223</sup> At trial, a police gang expert testified that over a twelve-week period, YA members committed two assaults, followed closely in time by the attempted murder before the court.<sup>224</sup> Vy argued that, given the long period of no criminal activity followed by three crimes, the gang should not be considered to have engaged in the consistent and repeated criminal conduct necessary to find the YA to be a criminal street gang.<sup>225</sup> The primary activities requirement as construed by *Sengpadychith* explicitly

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215. See, e.g., *People v. Nathaniel C.*, 279 Cal. Rptr. 236, 245 (Ct. App. 1991) (finding that "nonspecific hearsay" in which a San Francisco police officer merely repeated what unspecified San Bruno police told him was insufficient to establish a predicate offense); *People v. Leland D.*, 272 Cal. Rptr. 709, 713–14 (Ct. App. 1990) (holding "hearsay statements from unidentified gang members" to be insufficient evidence of primary activities).

216. *People v. Elodio O.*, 66 Cal. Rptr. 2d 95, 98 (Ct. App. 1997).

217. *Id.*

218. Baker, *supra* note 190, at 116.

219. *Sengpadychith*, 27 P.3d at 744; *People v. Loeun*, 947 P.2d 1313, 1318 (Cal. 1997).

220. *People v. Saldivar*, No. G043935, 2012 WL 1499033, at \*6 (Cal. Ct. App. Apr. 30, 2012).

221. *People v. Vy*, 19 Cal. Rptr. 3d 402 (Ct. App. 2004).

222. *Id.* at 405.

223. *Id.* at 413.

224. *Id.*

225. *Id.* at 414.

excluded the “occasional commission of . . . crimes by the group’s members.”<sup>226</sup>

The *Vy* court disagreed.<sup>227</sup> It cited the fact that, if the charged offense was included, there were three violent felonies committed by YA members over a short period of time; this meant that the commission of enumerated crimes was a primary activity of the entirety of the gang, despite the long period with no crimes committed.<sup>228</sup> It described this period as when YA’s level of criminal activity “lay dormant.”<sup>229</sup> Therefore, as long as group members eventually do engage in criminal activity, the primary activity requirement will be satisfied.<sup>230</sup> The court also cited the “significant expert testimony” by a police gang expert as independently satisfying the primary activity requirement.<sup>231</sup>

A similar result was reached in *People v. Duran*.<sup>232</sup> The two defendants in *Duran* were alleged to be members of a gang called Florencia 13 (F13).<sup>233</sup> The only evidence presented in *Duran* on primary activities was the current offenses charged, a four-year-old conviction for drug possession, and the testimony of a police gang expert.<sup>234</sup> The gang expert testified that the main activity of F13 was “putting fear into the community,” which on appeal Duran pointed out was not among the enumerated criminal offenses.<sup>235</sup> The gang expert explained his statement by saying, “often these gang members are committing robberies, assault with deadly weapons, narcotics sales, and they’re doing it as a group.”<sup>236</sup> The court ruled, because the expert interviewed F13 members and investigated gang-related crimes, there was a sufficient base of knowledge for his expert opinion, and there was sufficient evidence that F13 members committed enumerated offenses on “more than [an] occasional” basis.<sup>237</sup>

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226. *People v. Sengpadychith*, 27 P.3d 739, 744 (Cal. 2001).

227. *Vy*, 19 Cal. Rptr. 3d at 414.

228. *Id.*

229. *Id.*

230. *See id.*

231. *Id.*

232. *People v. Duran*, 119 Cal. Rptr. 2d 272 (Ct. App. 2002).

233. *Id.* at 278.

234. *Id.* at 277–78.

235. *Id.* at 286.

236. *Id.*

237. *Id.*



Thus, if group members commit enumerated crimes on “more than [an] occasional” basis, the primary activity requirement is satisfied.<sup>238</sup> Under California precedent, then, all it would take to determine that one of the Juggalos’ “primary activities” is the commission of enumerated crimes would be either evidence that a few Juggalos had committed such crimes *or* the opinion of a police officer that one of the Juggalos’ primary activities is the commission of such crimes.<sup>239</sup> Given the fact that some Juggalos do have criminal tendencies, the former would be easy to prove.<sup>240</sup> Police dislike for Juggalos and a lack of basic understanding of the group means that it would be easy to procure “gang expert” testimony from police officers swearing that enumerated crimes are a primary activity even if their base of knowledge is only hearsay, as long as they have some official-sounding source for this knowledge.<sup>241</sup> Because of the low standards for the “primary activity” requirement, all but the most innocuous groupings of Juggalos satisfy this element of the California gang definition. The primary activity requirement, as currently interpreted, measures not whether a certain group is criminal in purpose, but instead whether there are criminals or former criminals among its members.<sup>242</sup>

### 3. The Third STEP Act Requirement: A Pattern of Criminal Activity

The final element in the STEP Act’s gang definition is that the group’s members, either separately or as a group, “engaged in a pattern of criminal gang activity.”<sup>243</sup> The STEP Act defines a “pattern of criminal gang activity” as the “commission of, attempted commission of,

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238. *See id.*

239. *See supra* notes 199–238.

240. *See, e.g.,* Dodero, *supra* note 11, at 12 (discussing a “Drug Bridge” area at the Gathering where ten to twenty dealers gathered to sell THC and “green crack,” as well as the open consumption of narcotics); *see also* Nathan Rabin, *When Juggalos Attack: A Firsthand Account of the Tila Tequila Incident at the Gathering of the Juggalos*, A.V. CLUB (Aug. 16, 2010, 1:36 PM), <http://www.avclub.com/articles/strange-when-juggalos-attack-a-firsthand-account-of-the-ti,44221/> (recounting the attack by Juggalo audience members on “singer” Tila Tequila at the 2010 Gathering).

241. *See* NAT’L GANG INTELLIGENCE CTR., *supra* note 1, at 22 (sourcing this information to the NGIC reporting). The report elsewhere explains that the NGIC reporting includes an online system where law enforcement can request information and other law enforcement will provide it. *Id.* at 5. Such a system has an obvious potential for the spread of unsourced, biased, and just plain inaccurate information.

242. Baker, *supra* note 190, at 116.

243. *People v. Vy*, 19 Cal. Rptr. 3d 402, 411 (Ct. App. 2004) (quoting *People v. Gardeley*, 927 P.2d 713, 724 (Cal. 1996)) (internal quotation marks omitted).

conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [the act's enumerated] offenses.”<sup>244</sup> The STEP Act also requires that the last of these predicate offenses “occurred within three years after a prior offense” and the two offenses “were committed on separate occasions, or by two or more persons.”<sup>245</sup>

The California Senate believed that prosecution of a gang member under the STEP Act was inappropriate unless the “individual member[]” had “knowledge of the gang’s pattern of enumerated and specified serious crimes of violence and narcotics trafficking offenses.”<sup>246</sup> The “pattern of [gang] activity” element was intended to satisfy this notice requirement; the California legislature intended that this element would be “very difficult to prove except in the most egregious cases.”<sup>247</sup>

However, as the number of enumerated crimes has expanded, the predicate crime requirement has become increasingly easy to establish. The California appellate courts have also been willing to interpret the requirement quite loosely, meaning that this element in practice is far from “very difficult to prove.”<sup>248</sup> There is no requirement that the crimes be violent as long as they are amongst those enumerated by the legislature. Even a gang whose only prior alleged crime is graffiti writing is considered a “criminal street gang” by the STEP Act.<sup>249</sup> The

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244. CAL. PENAL CODE § 186.22(e) (West 1999 & Supp. 2014). In addition to the offenses listed, *supra*, in notes 201 and 202, the predicate act requirement can be satisfied by the additional non-violent offenses of theft of an access card or account information; counterfeiting, designing, or attempting to use an access card; fraudulent use of an access card; unlawful use of personal information to obtain credit, goods, services, or medical information; and wrongfully obtaining DMV documentation. *Id.* However, only one of the two predicate crimes can be one of these additional crimes, and the other must be one of the crimes listed, *supra*, in notes 201 and 202. CAL. PENAL CODE § 186.22(j).

245. CAL. PENAL CODE § 186.22(e).

246. Baker, *supra* note 190, at 115 (quoting CRIMINAL STREET GANG LEGISLATION: A SUPPORT BRIEF (1988), *microformed on legislative history file of A.B. 2013, 1987–1988 Reg. Sess.* (Cal. 1988) (Cal. State Archives)).

247. Baker, *supra* note 190, at 114 (quoting CAL. S. COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, REC. NO. 29069, 1987–1988 Reg. Sess., at 4) (internal quotation marks omitted).

248. *Id.* at 114 (internal quotation marks omitted).

249. *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 925–26 (Ct. App. 2004) (acknowledging that while the legislature, in passing the STEP Act was “clearly most concerned with violent gang crime, particularly murder,” but finding ultimately that the legislature was also interested in “the eradication of criminal activity by street gangs,” and that intent included the eradication of both violent and non-violent gangs (internal quotation marks omitted)).

charged offense in a given case can be considered a predicate offense.<sup>250</sup> There is no requirement that the predicate offenses resulted in a conviction.<sup>251</sup> Finally, although the predicate act requirement is described as a “pattern of criminal gang activity,” there need not be either multiple enumerated crimes or multiple gang members involved in enumerated crimes.<sup>252</sup> The “pattern” requirement is fulfilled when either a single gang member commits two enumerated offenses or where two or more gang members commit a single enumerated offense.<sup>253</sup> Because of the expansion in the number of crimes and the permissive interpretation of the predicate acts requirement, this final element is fairly simple to prove as well. Whether the Juggalos satisfy the final element of the STEP Act’s definition of criminal street gang depends on a problem, unaddressed by the statute, which we will call “scope.”

#### 4. A Final Issue with Interpretation of the STEP Act: The Problem of Scope

The scope problem is this: as there is no requirement about the number of gang members other than that it contains three participants,<sup>254</sup> and there is no requirement about the structure or hierarchy of the gang, it is often difficult to determine where one gang ends and another begins.<sup>255</sup> This determination, although dismissed as insignificant by some courts,<sup>256</sup> is vital; the size and scope of the gang control what evidence is admissible to prove that the gang has enumerated crimes as a primary activity and that gang members have committed a pattern of enumerated criminal activity.

This is an especially acute problem, as there are many gangs that share a name or colors but are not actually related in any significant way.<sup>257</sup> Even in situations where there are gangs with the same name in

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250. *People v. Cervantez*, No. F037467, 2002 WL 31425010, at \*19 (Cal. Ct. App. Oct. 30, 2002); *see also* *People v. Elodio O.*, 66 Cal. Rptr. 2d 95, 97 (Ct. App. 1997) (noting “[u]se of the current offense for the purpose of establishing a pattern has been uniformly upheld and approved”).

251. *Cervantez*, 2002 WL 31425010, at \*19.

252. *People v. Loeun*, 947 P.2d 1313, 1317–18 (Cal. 1997).

253. *Id.*

254. CAL. PENAL CODE § 186.22(f) (West 1999 & Supp. 2014).

255. *See, e.g.,* *People v. Ortega*, 52 Cal. Rptr. 3d 535, 543–45 (Ct. App. 2006).

256. *Id.* at 545 (finding that, “[i]n light of the nature of gang structure” before the court, “requiring the prosecution to prove the specific subset of a larger gang in which a defendant operated would be an impossible, and ultimately meaningless task”).

257. HOWELL, *supra* note 49, at 34.

the same city, the individual cliques may have nothing to do with each other.<sup>258</sup> The Juggalos, with “members” spread throughout the country but who lack anything approaching a leadership, organization, or hierarchy, should be included in this category. If one group of Juggalos has a propensity for criminality, or even if a certain group is an actual, organized crime group, this indicates nothing about the criminality or gang status of a group of Juggalos in another county or state. Courts and law enforcement must, but frequently do not, appreciate this distinction.

This problem of gang scope has most frequently arisen in connection with the Norteños. The Norteños have been described as either a gang<sup>259</sup> or a loose association of gangs.<sup>260</sup> The Norteños have their origins in the California state prison system; since the 1960s, gang members from Northern California have set aside their individual gang affiliations and become members of a confederate gang when entering the prison system.<sup>261</sup> Gang members from Southern California had a similar, rival confederation.<sup>262</sup> These confederations became known as the Norteños and the Sureños.<sup>263</sup> The Norteños and Sureños worked together to fight one another, individual gangs within each organization continued to be in conflict, and the confederations developed no overarching organizational structure.<sup>264</sup>

California courts first dealt with the problem of the Norteños in *People v. Valdez*.<sup>265</sup> The defendant in that case was a former member<sup>266</sup> of the East Side Familia (ESF), a Norteño affiliated gang.<sup>267</sup> Valdez met

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258. *Id.*

259. *Ortega*, 52 Cal. Rptr. 3d at 542; *People v. Jose P.*, 130 Cal. Rptr. 2d 810, 817 (Ct. App. 2003).

260. *People v. Valdez*, 68 Cal. Rptr. 2d 135, 143 (Ct. App. 1997).

261. HOWELL, *supra* note 49, at 13; Nat'l Drug Intelligence Ctr., *Gangs in the United States*, NARCOTICS DIG. WKLY., Oct. 4, 2005, at 1, 9; *see also* Al Valdez, *Tracking Sureños*, POLICE: L. ENFORCEMENT MAG. (Feb. 1, 2000), <http://www.policemag.com/channel/gangs/articles/2000/02/in-the-hood-and-surenos-tracking-a-gang.aspx>.

262. *Valdez*, *supra* note 261.

263. *Id.*

264. *Sureños*, SAMPSON CNTY. SHERIFF'S OFF., [http://www.sampsonsheriff.com/otherforms/20051011\\_surenos.pdf](http://www.sampsonsheriff.com/otherforms/20051011_surenos.pdf) (last visited May 8, 2014).

265. *Valdez*, 68 Cal. Rptr. 2d at 137.

266. *Id.* at 139. The prosecution alleged that the defendant was a current member, *id.* at 140, but because the STEP Act punishes a non-member who is an active participant in a gang, this distinction was not particularly relevant. CAL. PENAL CODE § 186.22(a) (West 1999 & Supp. 2014).

267. *Valdez*, 68 Cal. Rptr. 2d at 139.

with several other people in a park and they formed an apparently spontaneous caravan to find and attack Sureños.<sup>268</sup> The caravan, which included members of seven different gangs,<sup>269</sup> discovered a group of Sureños, and Valdez shot and killed one.<sup>270</sup> At trial, a police gang expert testified about the ESF, and Valdez was convicted of murder with the STEP Act sentencing enhancer.<sup>271</sup> The sentence was upheld on appeal, but the court of appeals noted in its decision that the caravan was “not a ‘criminal street gang’ within the meaning of the enhancement allegation.”<sup>272</sup> Because the police expert had testified that Norteños and Sureños were groups of gangs and not gangs themselves, the Norteños could not be considered a criminal street gang.<sup>273</sup>

However, in the subsequent case of *People v. Jose P.*,<sup>274</sup> the police gang expert testified that the Norteños were a gang, and that the defendant was a member of a Norteño subgroup, the Santa Rita gang.<sup>275</sup> The expert detailed the pattern of predicate offenses committed by the Norteños and testified that committing enumerated offenses was a primary activity of the gang.<sup>276</sup> The *Jose P.* court rejected the defendant’s contention that Valdez stood for the proposition that the Norteños were not a criminal gang.<sup>277</sup> Instead, it simply ruled that there was “sufficient evidence” to find the Norteños a gang without examining the question of whether it would be more appropriate to only examine the primary activities and pattern of criminal activity of the smaller Santa Rita gang.<sup>278</sup>

A similar result was reached in *People v. Ortega*.<sup>279</sup> Ortega was an admitted member of the Barrio North Side Norteños, a subset of the Norteños in Sacramento.<sup>280</sup> Rather than testifying about the activities and members of the Barrio North Side Norteños, however, the police

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268. *Id.* at 138.

269. *Id.* at 140.

270. *Id.* at 138.

271. *Id.* at 137, 139–40.

272. *Id.* at 143.

273. *Id.*

274. *People v. Jose P.*, 130 Cal. Rptr. 2d 810 (Ct. App. 2003).

275. *Id.* at 816.

276. *Id.*

277. *Id.*

278. *Id.*

279. *People v. Ortega*, 52 Cal. Rptr. 3d 535 (Ct. App. 2006).

280. *Id.* at 539, 542.

gang expert testified about the Norteños as a whole.<sup>281</sup> He testified that the Norteños had “thousands” of documented members<sup>282</sup> in Sacramento and that the gang had some twenty to twenty-five subsets in the area of the city.<sup>283</sup> He also testified that the Norteños’ primary activities included “murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing” and also testified regarding two predicate enumerated crimes committed by Norteños.<sup>284</sup> The court found this testimony established “every element of the existence of the Norteños as a criminal street gang.”<sup>285</sup>

Unlike the *Jose P.* court, the *Ortega* court elaborated on its decision. “[G]angs are not public and open . . . associations . . . . Rather, gangs are more secretive, loosely defined associations of people . . . .”<sup>286</sup> The court reasoned that, as it was difficult to collect evidence regarding gang membership, and there was testimony indicating it was “not uncommon for members of different gangs to work in concert to commit a crime,” the burden essentially fell on the defendant to prove that his group did not share the same criminal proclivities as the Norteños.<sup>287</sup> “No evidence indicated the goals and activities of a particular subset were not shared by the others.”<sup>288</sup> When one considers the original legislative intent behind the primary activity and pattern of criminal activity requirements, namely that the gang member have notice that he belongs to a criminal organization, and the intent that these elements be “very difficult to prove except in the most egregious cases,”<sup>289</sup> this implicit burden shifting appears quite troubling.

The most recent case involving the scope issue limited the *Ortega* analysis largely to the facts of that case. The defendant in *People v. Williams*<sup>290</sup> was a member of a group called the Small Town Peckerwoods.<sup>291</sup> At Williams’s trial for murder with the STEP Act gang

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281. *Id.* at 544.

282. *Id.*

283. *Id.* at 542.

284. *Id.* at 544.

285. *Id.*

286. *Id.* (quoting *People v. Valdez*, 68 Cal. Rptr. 2d 135, 142 (Ct. App. 1997)).

287. *Id.* at 545.

288. *Id.* at 544.

289. Baker, *supra* note 190, at 114 (quoting CAL. S. COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, Rec. No. 29069, 1987–1988 Reg. Sess., at 4) (internal quotation marks omitted).

290. *People v. Williams*, 86 Cal. Rptr. 3d 130 (Ct. App. 2008).

291. *Id.* at 132. Peckerwood was originally a nineteenth century racial slur used against

enhancement charged, a police gang expert testified regarding the larger Peckerwood organization, which the expert said the Small Town Peckerwoods were a faction of.<sup>292</sup> The expert testified about not only the white supremacist ideology of the Peckerwoods and the fact that there was a hierarchy by which the factions took orders from leaders inside the prison system, but also the fact that the Peckerwoods lacked a constitution and were more loosely organized than other gangs.<sup>293</sup> Specifically, he testified that the Peckerwood subsets “get together more for bragging than for strategizing, and one group of Peckerwoods will not necessarily know what another group is doing.”<sup>294</sup>

The *Williams* court ruled that only evidence concerning the Small Town Peckerwoods was relevant.<sup>295</sup> The court explained:

In our view, something more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.<sup>296</sup>

The court recognized that the police gang expert testified that there was a hierarchy of “shot callers” that gave orders within the Peckerwood organization, but absent any evidence “that the group calling themselves the Small Town Peckerwoods contained such a person, or that such a person was a liaison between, or authority figure within, both groups,” the connection was too tenuous to infer that the Small Town Peckerwoods were the same organization as the Peckerwoods.<sup>297</sup>

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poor and rural whites in the American South. Anti-Defamation League, *Hate on Display: A Visual Database of Extremist Symbols, Logos, and Tattoos*, ADL.ORG, [http://www.adl.org/hate\\_symbols/peckerwood.asp](http://www.adl.org/hate_symbols/peckerwood.asp) (last visited May 8, 2014) (describing the Peckerwoods and their history). It evolved into a term for white prisoners and eventually became an eponym for white power gangs “in and out of prison” and white power youths with ties to those gangs. *Id.*

292. *Williams*, 86 Cal. Rptr. 3d at 135.

293. *Id.*

294. *Id.*

295. *Id.* at 136.

296. *Id.* at 135.

297. *Id.* (internal quotation marks omitted).

Courts outside California have found the logic of *Williams* more compelling than that of *Ortega*. Virginia, which uses the same three elements for a criminal street gang as California, first addressed the issue of scope in *Taybron v. Commonwealth*.<sup>298</sup> The defendant in *Taybron* was charged with a count of active gang participation.<sup>299</sup> Taybron was allegedly an active member of a local gang called the 36th Street Bang Squad.<sup>300</sup> The prosecution also asserted that the 36th Street Bang Squad was part of a national gang, the Bloods.<sup>301</sup> The prosecution, instead of providing evidence of the criminality of the 36th Street Bang Squad to prove it was a criminal street gang, offered into evidence plea agreements from two “‘members[] or affiliat[es]’ of ‘the Bloods criminal street gang,’” Arenzo King and Jumar Turner.<sup>302</sup>

The police gang expert testified that King and Turner were not members of the 36th Street Bang Squad.<sup>303</sup> Instead, he asserted that King, Turner, and the defendant were all part of a national Bloods gang, based on their shared colors, hand signs, and “‘ideologies.’”<sup>304</sup> However, he also acknowledged that King and Turner were part of a “‘homegrown set[]” and were not members of a national Bloods organization.<sup>305</sup> Rather than a national unified organization, the police expert acknowledged that the 36th Street Bang Squad was a homegrown set that affiliated itself with the Bloods.<sup>306</sup> He also testified that local gangs affiliated with the Bloods were frequently in conflict with one another.<sup>307</sup>

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298. *Taybron v. Commonwealth*, 703 S.E.2d 270 (Va. Ct. App. 2011).

299. *Id.* at 272.

300. *Id.*

301. *Id.* Similar to the Sureños and Norteños, the Bloods and their foes the Crips are predominantly African-American “supergangs” made up of hundreds of smaller gangs, or “sets.” HOWELL, *supra* note 49, at 13, 33. From their birthplace in California, these gangs have spread across the country; there were some 1,100 gangs with Crip or Blood in their name in 115 cities in 1994. *Id.* at 13. However, the Bloods and the Crips lack anything approaching a national leadership and even in cities like Los Angeles the different sets of each “supergang” have no acknowledged hierarchy. *Id.* at 33. The lack of organization and competing interests means that Blood subsets are almost as likely to be in conflict with one another as against a Crip subset. *Id.* Local sets simply use names with national recognition in order to exaggerate their own reach and ferocity, and the threat of a nationally organized supergang is chimerical. *Id.* at 30.

302. *Taybron*, 703 S.E.2d at 272.

303. *Id.* at 273.

304. *Id.* at 272.

305. *Id.* at 273 (internal quotation marks omitted).

306. *Id.* at 272.

307. *Id.* The police expert testified, “there’s not . . . a whole lot of organization . . . with our Blood gangs, or even our Crip gangs, they tend to beef amongst each other. Um, so you’ll



The prosecution made no attempt to tie the defendant to Turner and King other than through some phantasmic national Bloods organization.<sup>308</sup>

On appeal, the Commonwealth argued that the predicate acts requirement could be satisfied by crimes committed by Bloods “‘in New York, California, Texas, anywhere . . . no matter how remote,’ as long as they all claim to be Bloods.”<sup>309</sup> The Commonwealth argued that all gangs that shared a name should be considered a single national gang.

The Virginia Court of Appeals rejected this argument and reversed Taybron’s gang participation conviction.<sup>310</sup> The Court found that “adopting the Commonwealth’s position would render virtually meaningless the statute’s requirement” of proving predicate crimes by the gang.<sup>311</sup> The *Taybron* court found instead that this was a case where, in the same city, “there [were] two mutually exclusive gangs, with different leaders and no interaction, that happen to share the same name.”<sup>312</sup> Only where local cliques “shared an identical hierarchical structure and routinely operated in concert” could they be considered the “same national or local ‘organization, association, or group.’”<sup>313</sup>

The Juggalos are much more similar to the Peckerwoods in *Williams* than the Norteños in *Ortega*. The Juggalos lack any sort of criminal “collaborative activities or collective organizational structure.”<sup>314</sup> Just like the Small Town Peckerwoods, Juggalo subsets share the name and “ideology,” if a shared appreciation for clown rap and face paint can be deemed ideological, but *Williams* demands “something more . . . before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang.”<sup>315</sup>

Therefore, although there be may be certain distinct, insular groups of Juggalos that satisfy the three STEP Act elements of a criminal street gang, evidence only of the primary activities and patterns of criminal

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have Bloods fighting with Bloods.” *Id.* (internal quotation marks omitted).

308. *Id.* at 276.

309. *Id.*

310. *Id.* at 278 (citing VA. STATE CRIME COMM’N, H. DOC. NO. 40, HJR 573 FINAL REPORT: STUDY OF CRIMINAL GANGS 4 n.11, 6 (2006)).

311. *Id.* at 276.

312. *Id.* at 277 (quoting VA. STATE. CRIME COMM’N, *supra* note 310, at 6 (internal quotation marks omitted)).

313. *Id.* at 278 (quoting VA. CODE ANN. § 18.2–46.1 (2009 & Supp. 2012)).

314. *See* *People v. Williams*, 86 Cal. Rptr. 3d 130, 135 (Ct. App. 2008).

315. *See id.*

activity of members of those individual groups should be admissible to prove the gang enhancement provisions or the substantive crime. In the words of one court, “just because certain members of a hypothetical group play musical instruments, it does not follow that the group is an orchestra.”<sup>316</sup> The better view of the status of Juggalos under California gang law is that there may be Juggalos who are gang members and there may be gangs *of* Juggalos, but that does not mean that the Juggalos are a gang or all Juggalos are gang members. There is no national superstructure of Juggalos; instead, each local group is a “homegrown subset” as in *Taybron*,<sup>317</sup> an insular group whose actions indicate nothing about the criminality of another, unrelated grouping of Juggalos. Without some specific, particularized evidence regarding the local group a Juggalo interacts with, he should not be declared a gang member.<sup>318</sup>

### *B. Legislative Gang Definitions outside California*

The federal government and most states that have passed legislation defining criminal gangs in the past twenty-five years have borrowed liberally from the STEP Act definition.<sup>319</sup> Due to this borrowing, the rest of the nation’s definitions of a gang have the same or similar constitutional and practical problems as the STEP Act. The other state definitions have far less judicial interpretation than the STEP Act.<sup>320</sup>

The vast majority of the states’ and the federal definition of criminal street gang are lifted wholesale from the STEP Act.<sup>321</sup> Many departures

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316. *Origel-Candido v. State*, 956 P.2d 1378, 1381 (Nev. 1998).

317. *Taybron*, 703 S.E.2d at 278.

318. In an unpublished Modesto, California case, for example, a police investigator testified that there are five distinct Juggalo groups in that city—Modesto Family Klowns, Psychopathic Criminal Klowns, Juggalo Rider Bitch, Down 2 Party, and Nothing 2 Lose. Susan Herendeen, *Park Assault Suspects to Be Tried—Enough Evidence of Gang Affiliation, Judge Decides*, MODESTO BEE, May 9, 2009, at B2. However, the police witness could not specify which group the defendants belonged to. *Id.* Properly, the prosecution should only be able to use testimony and evidence regarding the specific Juggalo subset to establish the primary activity and pattern of crimes elements.

319. Truman, *supra* note 174, at 710; *see also infra* notes 321–24.

320. Some state gang definitions have no significant appellate decisions interpreting their elements other than a decision ruling that the definition is not unconstitutionally vague. *See, e.g.*, *State v. Baldenegro*, 932 P.2d 275, 279–80 (Ariz. Ct. App. 1996); *People v. Jamesson*, 768 N.E.2d 817, 827–30 (Ill. App. Ct. 2002); *State v. Williams*, 773 N.E.2d 1107, 1110–12 (Ohio Ct. App. 2002).

321. *See, e.g.*, 18 U.S.C. § 521 (2012); IDAHO CODE ANN. § 18–8502(1) (Supp. 2012); IOWA CODE ANN. § 723A.1(2) (West 2013); KAN. STAT. ANN. § 21-6313(a) (Supp. 2012); LA. REV. STAT. ANN. § 15:1404 (2005 & Supp. 2013); MINN. STAT. ANN. § 609.229 (West 2009); MO. ANN. STAT. § 578.421(1) (West 2011); MONT. CODE ANN. § 45-8-402(1) (2013); N.C.

from the California definition are minor<sup>322</sup> or stylistic.<sup>323</sup> Interpretation of state statutes has also closely followed the lead of the California courts in jurisdictions that used the STEP Act's definitions.<sup>324</sup>

When states have departed from the three elements of the STEP Act, it has generally been to make proving the existence of a gang even easier.<sup>325</sup> Some jurisdictions have removed the primary activity element, making a group a criminal street gang as long as it is an organization with a certain low number of members and those members have engaged in a pattern of criminal activity.<sup>326</sup> Some jurisdictions have significantly altered the enumerated crimes portion of the STEP Act. Arkansas, for example, accepts as a predicate crime for establishing a pattern of criminal activity, "any violation of Arkansas law which is a crime of violence or pecuniary gain."<sup>327</sup> Florida, among others, has eliminated the pattern of crimes element entirely.<sup>328</sup>

GEN. STAT. § 14-50.16(b) (2011); OHIO REV. CODE ANN. § 2923.41(A) (LexisNexis 2010); TENN. CODE ANN. § 40-35-121(a)(1) (2010 & Supp. 2012); UTAH CODE ANN. § 76-9-902(1) (LexisNexis 2012); WASH. REV. CODE § 9.94A.030(12) (West 2010 & Supp. 2014); WIS. STAT. § 939.22(9) (2011–2012); WYO. STAT. ANN. § 6-1-104(a)(xiv) (2013).

322. See, e.g., 18 U.S.C. § 521 (defining a criminal street gang as a group of five or more persons, rather than the three participants needed for a criminal street gang in California).

323. See, e.g., ALA. CODE § 13A-6-26(a) (LexisNexis 2005) (defining a "streetgang" rather than a criminal street gang).

324. See, e.g., *In re C.T.*, 521 N.W.2d 754, 757 (Iowa 1994) (holding that for the purpose of establishing that a criminal act took place when proving a criminal street gang, only some evidence that the crime took place is required, not evidence that the perpetrator was ever convicted or even arrested for the offense); *State v. Lewis*, 514 N.W.2d 63, 68 (Iowa 1994) (ruling that a police gang expert's testimony that one of the primary purposes of a group was the commission of crimes satisfied the Iowa criminal street gang statute's primary activities requirement); *State v. Browne*, 494 N.W.2d 241, 244 (Iowa 1992) (holding that for the purposes of establishing a pattern of criminal gang activity, a single criminal act in which two or more gang members participated was sufficient); *State v. Hayes* 532 N.W.2d 472, 475–76 (Iowa Ct. App. 1995) (holding that for the purposes of establishing a pattern of criminal gang activity, a police gang expert's testimony that one of the primary purposes of a group was the commission of crimes was sufficient).

325. Rodrigo M. Carugo, Comment, *In the Trenches of Florida's War on Gangs: A Framework for Prosecuting Florida's Anti-Gang Sentence Enhancement Provision*, 14 BARRY L. REV. 97, 108–10 (2010) (discussing the 2008 amendment of the Florida criminal gang definition removing the pattern of criminal activity element and expanding the definition of gang member). These changes made it "easier to categorize a specific group as a criminal gang." *Id.* at 110.

326. ALA. CODE § 13A-6-26(a); ALASKA STAT. § 11.81.900(b)(13) (2012 & Supp. 2013); S.D. CODIFIED LAWS § 22-10A-1(1) (2006).

327. ARK. CODE ANN. § 5-74-103(b) (1997). Virginia's pattern of crimes element requires two distinct crimes, at least one of which is a crime of violence. VA. CODE ANN. § 18.2-46.1 (2009 & Supp. 2012).

328. FLA. STAT. ANN. § 874.03(1) (West 2000 & Supp. 2013); GA. CODE ANN. § 16-15-

Some states have fairly vague gang definitions. Colorado, for instance, defines the gang as “a group of three or more individuals with a common interest, bond, or activity, characterized by criminal or delinquent conduct, engaged in either collectively or individually.”<sup>329</sup> There is no requirement that the gang have a pattern of criminal activity or the commission of crimes as a primary activity, or even that gang members be engaged in collective criminality. Indiana includes in its definition of a criminal gang any “group with at least three (3) members that specifically . . . promotes, sponsors, or assists in . . . the commission of a felony.”<sup>330</sup>

There are clauses in some jurisdiction’s definitions of the criminal gang that indicate that the drafters were at least aware that vague gang definitions created a potential for abuse. In Washington, the definition of criminal street gang essentially recapitulates the STEP Act, but those three familiar elements are followed by a statement that, “[t]his definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.”<sup>331</sup> Michigan’s definition of “gang” excludes non-profits.<sup>332</sup> In the District of Columbia, legislators were concerned that the gang definition would have outlawed “many of the civil rights groups in the 1950s–1960s.”<sup>333</sup> As a result, the D.C. gang definition prohibits police and prosecutors from considering “acts of civil disobedience” when determining whether a group’s “purposes or frequent activities” include criminality.<sup>334</sup> This exclusionary clause indicates that at least some legislatures are aware that their gang definitions are vague enough to invite abuse and harassment of legitimate organizations.

Some state alterations of the STEP Act narrow the definition. South Carolina’s definition, for example, is a marked improvement over the

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3(2) (2011); NEB. REV. STAT. § 43-245(5) (Supp. 2013).

329. COLO. REV. STAT. § 19-1-103(52) (2013).

330. IND. CODE ANN. § 35-50-2-1.4 (LexisNexis 2009).

331. WASH. REV. CODE § 9.94A.030(12) (West 2010 & Supp. 2014).

332. MICH. COMP. LAWS § 750.411v(5)(a) (Supp. 2013).

333. D.C. COMM. ON THE JUDICIARY, REP. ON B. 16-247, THE “OMNIBUS PUBLIC SAFETY ACT OF 2006,” (2006) (explaining the committee’s proposed change to the bill to exempt civil disobedience activities and to raise the number of members from three to ten “[i]n response to civil liberties concerns raised by witnesses”). The bill as enacted requires six members for a group to be a gang. Omnibus Public Safety Amendment Act of 2006, tit. I, § 101, 53 D.C. Reg. 1, 5 (Oct. 27, 2006) (codified at D.C. CODE § 22-951 (LexisNexis 2014)).

334. D.C. CODE § 22-951(e)(B).

STEP Act. Instead of focusing only on criminality of a group's members, while ignoring the purpose of the group, South Carolina defines a criminal gang as a "formal or informal . . . organization" that "form[s] for the purpose of committing criminal activity" and consists of five or more persons "who knowingly and actively participate in a pattern of criminal gang activity."<sup>335</sup> The same three elements as the STEP Act are present, but they are reworked such that the definition cannot be applied to any innocent group.<sup>336</sup> In South Carolina, the Juggalos could not be considered a criminal gang, because the group was not formed "for the purpose of committing criminal activity."<sup>337</sup>

Several states define what it means to be a gang member,<sup>338</sup> an important definition that the California legislature abdicated to local law enforcement. A state definition is preferable insofar as it prevents the undesirable California situation, where a patchwork of local definitions means that many people are considered a gang member in one county but not in the next.<sup>339</sup> Most states that define membership use a factor approach where satisfying two of a certain number of listed criteria makes an individual a gang member.<sup>340</sup> These factor approaches

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335. S.C. CODE ANN. § 16-8-230(2) (2003).

336. *See id.*

337. *See id.*

338. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-105(9) (2010 & Supp. 2013) (defining as a criminal street gang member any individual that meets two of seven enumerated criteria); FLA. STAT. ANN. § 874.03(2)–(3) (West 2000 & Supp. 2013) (listing eleven factors and defining any individual who satisfies the requirements of one factor a "gang associate" and any individual who satisfies two factors a "gang member"); 740 ILL. COMP. STAT. ANN. 147/10 (West 2010 & Supp. 2013) (defining as a gang member "any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity"); N.J. STAT. ANN. § 2C:33–29 (West Supp. 2013) (defining a criminal street gang as any three persons "associated in fact" if they satisfy two of seven listed "criteria that indicate criminal street gang membership"); S.D. CODIFIED LAWS § 22-10A-1(2) (2006) (defining as a gang member "any person who engages in a pattern of street gang activity" and satisfies two of seven factors); TENN. CODE ANN. § 40-35-121(a)(2) (2010 & Supp. 2012) (defining as a "criminal gang member" any person who is a member of a criminal gang and meets two of seven enumerated criteria).

339. Baker, *supra* note 190, at 110–11 (arguing that leaving the term gang member undefined fails to provide adequate notice of what is made criminal by the STEP Act and also encourages discriminatory and arbitrary enforcement).

340. The "factor states" use seven criteria, although these criteria vary, with the exception of Florida, which uses eleven. *See supra* note 338. While Arizona lists seven factors, the final criterion is a catchall provision of "[a]ny other indicia of street gang

can lead to undesirable results where otherwise innocuous activity can lead to classification as a gang member.<sup>341</sup> For example, under the Arizona definition of gang member, an individual who wore clothing associated with a gang and was seen in the company of gang members or frequented gang areas could be considered a gang member.<sup>342</sup> However, even where gang membership is defined, the binary conception of any individual associated with a gang as a member and all others as non-members ignores the complexity and subtlety of membership in gangs.<sup>343</sup>

Some states have definitions of a gang that are not the progeny of the Step Act. These may incorporate elements of sociological definitions of the gang that the STEP Act ignored. Connecticut defines a gang as a “group of juveniles or youths,”<sup>344</sup> utilizing the age requirement of many social science definitions.<sup>345</sup> One of Texas’s two definitions requires that gang members “continuously or regularly associate in the commission of criminal activities,”<sup>346</sup> using the social science definition’s requirement of continual face-to-face interaction.<sup>347</sup>

Several states have some requirement of minimal organization or leadership.<sup>348</sup> Illinois and Mississippi require that a gang have “an established hierarchy”;<sup>349</sup> similarly, Maryland requires that a group have

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membership.” ARIZ. REV. STAT. ANN. § 13-105(9)(g). Illinois defines membership without using factors. 740 ILL. COMP. STAT. ANN. 147/10.

341. See Truman, *supra* note 174, at 717.

342. ARIZ. REV. STAT. ANN. § 13-105(9)(f)–(g).

343. There are three categories of individuals who consistently associate with gangs and gang activities—“old gangsters,” the leadership and hard-core members of a gang; members, who are official participants who may have participated in some initiation ceremony like “jumping-in”; and wannabes, who are not gang members but may aspire to be or pretend to be. YABLONSKY, *supra* note 98, at 9–11. Yablonsky also identifies three additional non-member classes that are frequently categorized by police as gang members: groupies, who associate with gang members and may dress like them, but are not members and do not participate in gang activities; residents of neighborhoods in gang territory, who are often seen with gang members but also do not participate; and former members, who have aged out of the gang or otherwise left it but are frequently seen by law enforcement as current members. *Id.* at 11. It is little wonder that police and legislatures have not seen fit to create official classifications for such subtle and malleable categories, but official ignorance of an individual’s status often leads to erroneous allegations of gang membership. See Howell, *supra* note 152, at 632.

344. CONN. GEN. STAT. ANN. § 29-7n(a) (West 2009 & Supp. 2013).

345. See *supra* notes 135–37 and accompanying text.

346. TEX. PENAL CODE ANN. § 71.01(d) (West 2011).

347. See *supra* notes 127–31 and accompanying text.

348. See *supra* notes 117–26 and accompanying text.

349. 740 ILL. COMP. STAT. ANN. 147/10 (West 2010 & Supp. 2013); MISS. CODE ANN. § 97-44-3(a) (2006).

in common “an overt or covert . . . command structure.”<sup>350</sup> Until recently, Texas law required that a gang have a “hierarchical structure” and “profit-sharing among two or more members.”<sup>351</sup> Michigan goes a step further by requiring both “[a]n established leadership or command structure” and “[d]efined membership criteria.”<sup>352</sup> The Wolverine State is also unique in requiring that a gang have “geographical or territorial sites,”<sup>353</sup> incorporating the common social science gang requirement of association with some territory.<sup>354</sup>

These additional criteria should ensure that only the worst organized crime organizations, the groups that were originally targeted by the STEP Act and its progeny, will be the primary groups affected by anti-gang measures. Obviously, under any gang definition that requires a hierarchical structure or association with a geographic territory, the Juggalos would not fall within that definition.

#### VI. GANG DEFINITIONS MUST BE NARROW TO AVOID INFRINGING CONSTITUTIONAL RIGHTS

There are multifarious negative consequences to an individual if a group he is associated with is declared a gang.<sup>355</sup> A wide variety of constitutional rights are implicated when a group is declared a gang; this

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350. MD. CODE ANN., CRIM. LAW § 9-801(c)(3) (LexisNexis 2012). Nevada’s gang definition also has an interesting organizational component; it requires a gang to be “so constructed that the organization will continue its operation even if individual members enter or leave the organization” and also to have “particular conduct, status and customs indicative of it.” NEV. REV. STAT. ANN. § 193.168(8) (LexisNexis 2012).

351. TEX. PENAL CODE ANN. § 71.023(c) (2011).

352. MICH. COMP. LAWS § 750.411v(5)(a) (Supp. 2013).

353. *Id.*

354. *See supra* notes 111–16 and accompanying text.

355. Howell, *supra* note 152, at 652 (citing UNIV. OF ST. THOMAS & SAINT PAUL NAACP, EVALUATION OF GANG DATABASES IN MINNESOTA & RECOMMENDATIONS FOR CHANGE 20–21, *available at* <https://dps.mn.gov/divisions/bca/Documents/Evaluation%20of%20Gang%20Databases%20in%20Minnesota%20and%20Recommendations%20for%20Change.pdf>) (discussing individuals who were denied employment opportunities or probation because of their inclusion in a gang database); Guy, *supra* note 28 (quoting a Juggalo parolee expressing his frustration with being “unfairly singled out by police” and the fact he could be imprisoned for wearing face paint); *Juggalos Describe Harassment after Being Labeled “Gang” by FBI*, OAKLAND PRESS (Jan. 14, 2013, 12:00 AM), <http://www.theoaklandpress.com/general-news/20130114/juggalos-describe-harassment-after-being-labeled-gang-by-fbi> (describing a female Juggalo being denied custody of her child due to allegations of gang membership). Two individual plaintiffs in the ACLU lawsuit against the FBI challenging the Juggalo gang classification also told of being stopped and questioned by police based on their Juggalo paraphernalia. Itzkoff, *supra* note 4. A third plaintiff was denied admission to the Army due to his Juggalo related tattoos. *Id.*

necessitates a narrowly drawn definition of the term. It should be of special concern to courts that anti-gang measures almost exclusively affect people disfavored by the law and society—the poor and minorities.<sup>356</sup> Due to the violation of constitutional rights and the unequal enforcement facilitated by current gang definitions, a change in the current law defining gangs is necessary.

#### *A. First Amendment Concerns*

Gang definitions have been criticized on two First Amendment grounds: that the definitions impede the right of association and that they prevent individual free expression. Gang members are often identified by the individuals they associate with and the clothes they wear. Far from being a potential problem, there are already examples of gang statutes being applied in a disconcertingly overbroad manner, where defendants are found to be gang members based only on clothing or other innocent expressive conduct.<sup>357</sup>

When gang definitions are unduly vague, it threatens the free expression and association rights not only of gang members, but of individuals not involved in a gang in any way. An example of this problem involving the classification of the Juggalos as a gang already exists. The plaintiffs in *Baribeau v. City of Minneapolis* dressed as zombies, including face makeup, and walked through a downtown area

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356. Howell, *supra* note 152, at 636. Howell surveyed sixty-four defense attorneys in twelve states; when asked about the race of clients who had been accused of being gang members, 86.8% of respondents reported they had black clients alleged to be in a gang. *Id.* at 631, 636 (citing survey results). An identical number of respondents reported they had represented Latinos with those allegations. *Id.* at 636. In contrast, only 24.5% reported representing white clients with allegations of gang membership. *Id.* However, surveys of youth indicate that 40% of gang members are white. *Id.* at 621 (citing JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INST., GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 37 (2007), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07\\_rep\\_gangwars\\_gc-ps-ac-jj.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-jj.pdf)).

357. See, e.g., *R.C. v. State*, 948 So. 2d 48, 51 (Fla. Dist. Ct. App. 2007) (overturning as based on insufficient evidence the trial court's determination that a juvenile was a gang member when the only admissible evidence was the fact that the juvenile "wore shirts and book bags with gang symbols"); *L.B. v. State*, 965 So. 2d 1214, 1217 (Fla. Dist. Ct. App. 2007) (overturning as based on insufficient evidence the trial court's determination that a juvenile was a gang member where the only evidence was the juvenile's tattoo and the fact that he wore his pants low); *In re A.G.*, 730 S.E.2d 187, 188 (Ga. Ct. App. 2012) (rejecting the trial court's finding that four juveniles were gang members where the only evidence was writing in one child's notebook and the fact that the children had bandanas on their persons when arrested).



in an effort to “protest the ‘mindless’ nature of consumer culture.”<sup>358</sup> They carried with them a jury-rigged public address system that played music and allowed the protestors to broadcast announcements.<sup>359</sup> Officers responded to a 911 call regarding the protest, but the police merely admonished the protestors to be quieter and “keep their distance from bystanders.”<sup>360</sup> However, the officers subsequently discussed the incident with a sergeant, who supposedly “expressed concern that the plaintiffs were affiliated with the Juggalos, a violent gang . . . known for wearing face paint.”<sup>361</sup> It is questionable whether the sergeant’s concerns were pretextual or stemmed from an actual ignorance of who the Juggalos actually are. The officers then returned and detained the protestors for “disorderly conduct”; they were eventually transferred to a central jail and held for two nights before being released.<sup>362</sup>

*Baribeau* should be concerning for several reasons. Primarily, the First Amendment rights of the protestors were violated, as well as their right to be free from an unreasonable seizure of their person.<sup>363</sup> It should also be worrying that the officers detained the protestors as a result of some half-remembered association of the Juggalos, “a violent gang,”<sup>364</sup> with people wearing face paint. The officers either knowingly violated the law and used an imaginary association with the Juggalos as a pretext to illegally arrest citizens trying to express themselves, or they had such a poor understanding of what a Juggalo or a violent gang is that they acted illegally out of incompetence. Neither explanation is encouraging.

The free association right is also threatened by anti-gang measures.<sup>365</sup> The Supreme Court has made clear its disapproval of “governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen’s association with an unpopular organization.”<sup>366</sup> While this right protects associations that “pertain to

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358. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 470 (8th Cir. 2010).

359. *Id.* at 471.

360. *Id.*

361. *Id.*

362. *Id.* at 471–72.

363. *Id.* at 478–79.

364. *Id.* at 471.

365. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 211–12.

366. *Werdegart*, *supra* note 189, at 429 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982)) (internal quotation marks omitted).

the social, legal, and economic benefit[s] of the members,”<sup>367</sup> it does not protect criminal associations like a criminal street gang.<sup>368</sup> Overbroad definitions of gangs threaten the right of association and the constitutional prohibition on guilt by association.

A recent anti-gang measure is the gang nuisance injunction. This is a civil measure that enjoins normally legal behavior by individuals considered gang members by law enforcement.<sup>369</sup> Gang injunctions can criminalize behavior such as appearing in public with another individual who is considered a gang member, appearing in public with a person who possesses alcohol, carrying a phone, waving at cars, or “annoying” people.<sup>370</sup> The anti-gang injunction is a powerful weapon that abridges many fundamental rights, and for it to remain constitutional the definition of gang must be narrowly drawn.

#### *B. Fourth Amendment Concerns*

The Fourth Amendment rights of gang members are also curtailed to some extent. In *Arizona v. Johnson*,<sup>371</sup> the Supreme Court upheld a Terry frisk of a passenger during a traffic stop that discovered a gun.<sup>372</sup> One of the officers decided to question the passenger about his possible gang affiliation, and asked the passenger to leave the car.<sup>373</sup> The Court rationalized that the officer was justified in believing the passenger was armed, as the passenger had a blue bandanna, was from a town the officer “knew was home to a Crips gang,” and the traffic stop occurred in a neighborhood “associated with the Crips gang.”<sup>374</sup> *Johnson* shows that, even if the police do not have any indication an individual is a gang member except his clothing and physical location, a suspected gang member is subject to search and seizure on a less particularized suspicion of dangerousness. Such reduced protections for privacy are

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367. Bjerregaard, *supra* note 175, at 36 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)) (internal quotation marks omitted).

368. Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 256 (2010) (citing *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 608–09 (Cal. 1997)).

369. *Id.* at 246.

370. *Id.*; Strosnider, *supra* note 176, at 140; Werdegarr, *supra* note 189, at 411.

371. *Arizona v. Johnson*, 555 U.S. 323 (2009).

372. *Id.* at 328, 330, 333–34.

373. *Id.* at 328.

374. *Id.* at 327–28.

perhaps reasonable when law enforcement is trying to deal with a truly dangerous group.

However, when it is a largely innocent group like the Juggalos, the reduction of Fourth Amendment protections is indefensible.<sup>375</sup> One California anti-gang officer claimed an individual could be “stopped and questioned” simply for wearing face paint but “would not be arrested solely on that basis.”<sup>376</sup> Gang task forces have been known to stop and question individuals, photograph them, and profile them in gang databases simply for wearing ICP t-shirts.<sup>377</sup> The failure of the legislature and courts to provide a stronger gang definition is the cause of this waste of police resources and violation of privacy.

### C. Sixth Amendment Concerns

Allegations of gang membership can impair an individual’s ability to put on an effective criminal defense.<sup>378</sup> The Supreme Court has recognized that admission of evidence of gang membership unrelated to the crimes charged can rise to the level of constitutional error.<sup>379</sup> However, despite the recognized potential for prejudice, if a gang sentencing enhancement or substantive gang participation crime is charged, evidence of gang membership is automatically relevant.<sup>380</sup> Charging a gang enhancement often gives prosecutors carte blanche to introduce generally inadmissible character evidence and threatens the jury convicting a defendant simply because he associates with bad people, rather than due to the jury’s belief in the defendant’s guilt.<sup>381</sup>

The use of police witnesses, testifying as gang experts and using hearsay information, is also troubling.<sup>382</sup> Police witnesses in gang trials

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375. Cizmar recounts a story told to him by a twenty-eight-year-old mother of two with a Hatchman logo sticker in her back window; she was pulled over by police on a pretextual traffic stop, accused of being a gang member, and had her picture taken for inclusion in a gang registry. Cizmar, *supra* note 3.

376. Guy, *supra* note 28.

377. Herendeen, *supra* note 31 (describing the actions of the Central Valley Gang Impact Task Force in stopping a seventeen-year-old boy, his girlfriend, and the boy’s father, and including them in a gang database as Juggalos based solely on their clothing).

378. Howell, *supra* note 152, at 636 (“[E]vidence of gang membership is so prejudicial as to overwhelm the rest of the case and the case becomes a defense of gang membership and how bad the gang is.” (quoting survey results)).

379. Dawson v. Delaware, 503 U.S. 159, 165 (1992).

380. People v. Hernandez, 94 P.3d 1080, 1086 (Cal. 2004).

381. See Howell, *supra* note 152, at 636 (citing survey results).

382. Jack Nevin, *Conviction, Confrontation, and Crawford: Gang Expert Testimony as Testimonial Hearsay*, 34 SEATTLE U. L. REV. 857, 873–74 (2011) (“[G]ang expert

frequently testify about an ultimate issue, the existence of a gang, which is properly the duty of the jury to determine.<sup>383</sup> Jurors tend to treat police testimony as inherently trustworthy, which is problematic especially where police testimony provides the only evidence of a given group's status as a gang<sup>384</sup> or where an officer testifies both as to his own personal knowledge and as an expert.<sup>385</sup> Police officers do not necessarily qualify as experts simply due to their "street experience."<sup>386</sup> Finally, where a police expert bases his opinion on testimonial hearsay, this evidence violates the Confrontation Clause rights of the defendant.<sup>387</sup>

The use of hearsay, prejudicial evidence, and police experts may be necessary to convict truly dangerous gang members. Given the threats that these prosecutorial shortcuts pose to basic trial rights, it is important that only those who are truly gang members and pose a threat to society are targeted. A closely drawn gang definition is therefore necessary.

#### *D. Eighth Amendment Concerns*

An allegation of gang membership severely impairs an individual's ability to be released on reasonable bail as guaranteed by the Eighth Amendment.<sup>388</sup> Despite the fact that most gang members are not involved in criminal or violent activity, prosecutors regularly request higher bail because the defendant is alleged to be a gang member.<sup>389</sup> Denial of pretrial release often results in the defendant accepting a plea bargain to escape jail, even where the defendant is innocent or not a

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testimony . . . can be used to unfairly disadvantage the defendant and even to threaten the constitutional right to a fair trial. This is harmful to both a defendant and to the criminal justice system." (footnote omitted) (citing *United States v. Mejia*, 545 F.3d 179, 190 (2d Cir. 2008))).

383. Patrick Mark Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L.Q. 385, 407–08 (2004).

384. *Id.* at 394, 408.

385. Nevin, *supra* note 382, at 880–81.

386. Mahoney, *supra* note 383, at 408 ("Street experience does not transform officers into behavioral scientists who can predict individual or group behavior." (quoting Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 771 (1990))); Nevin, *supra* note 382, at 875.

387. Nevin, *supra* note 382, at 880–81.

388. See U.S. CONST. amend. VIII; *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

389. Howell, *supra* note 152, at 623–24.

gang member.<sup>390</sup> Poorly maintained gang databases, the broad definitions of gangs, and the misperception of gang members as universally violent create a situation where many individuals are denied bail unnecessarily.

*E. Fourteenth Amendment Concerns: Vagueness, Due Process, and Equal Protection*

Gang definitions have frequently been attacked in state and federal courts as vague.<sup>391</sup> There are two independent reasons why a criminal law can be invalidated as vague.<sup>392</sup> A vague law may either fail to define an offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited” or it may “encourage arbitrary and discriminatory enforcement.”<sup>393</sup> Current interpretation of the STEP Act leaves the definition of criminal street gang so loose that any grouping of three or more people that includes a person or persons who have been accused of a crime is included.<sup>394</sup> The criminal street gang definition is arguably void for vagueness on the grounds that it fails to define the conduct prohibited with sufficient definiteness.<sup>395</sup> Current vague definitions of a gang should also be amended due to the proven danger of arbitrary and discriminatory enforcement.

Discrimination on the basis of race and class is rampant in the determination of who is and who is not a gang member.<sup>396</sup> Police are far more likely to consider black and Latino men to be gang members.<sup>397</sup> In some cities, overzealous gang officers consider virtually any grouping of black and Latino men a gang.<sup>398</sup> In recent years, over 90% of the individuals in the police gang database in Orange County, California, were minorities; in Los Angeles County, 47% of African-American men were considered gang members; in Charlotte, North Carolina, 96% of documented gang members were minorities; and in Denver, 66% of young black males in the city were in the gang database, and black and

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390. *See id.* at 635.

391. Bjerregaard, *supra* note 175, at 40 (listing cases).

392. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion).

393. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

394. *See supra* Part V.

395. *See Bjerregaard, supra* note 175, at 35, 41.

396. Linda S. Beres & Thomas D. Griffith, *Gangs, Schools, and Stereotypes*, 37 LOY. L.A. L. REV. 935, 946, 978 (2004).

397. *See id.* at 971.

398. *See Howell, supra* note 152, at 622.

Latino males together made up 93% of the people in that database.<sup>399</sup> The rather loose gang definitions favored by the legislatures, as well as the laissez-faire attitude taken towards law enforcement definitions of gang membership, means that “gang members who participate in the gang for lawful reasons, or for those who the police might call a gang member but actually are not,”<sup>400</sup> are among those most affected by anti-gang measures. Many jurisdictions use multi-factor definitions of gang membership, including clothing, association with known gang members, and being seen in “gang locations” that allow law enforcement to categorize virtually any urban youth as a gang member.<sup>401</sup> There are many police departments where racial bias is a “deeply entrenched” problem, and adding vaguely defined powers to the law enforcement arsenal serves only to enable “arbitrary and discriminatory treatment.”<sup>402</sup>

Empirical research has shown that a significant number of white youths are gang members. Although rates of gang membership for whites are somewhat lower than those of Latino and black youths,<sup>403</sup> the fact that whites make up a greater percentage of the population means that, in absolute terms, there are more white gang members than blacks or Latinos.<sup>404</sup> In stark contrast to the readiness of police to label minorities as gang members in many cities, law enforcement and media largely fail to label criminal groupings of middle-class whites as gangs.<sup>405</sup>

The Juggalos are distinct from most groups that are considered gangs by police in that they are predominantly white.<sup>406</sup> However, like

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399. *Id.* at 653.

400. Werdegar, *supra* note 189, at 432.

401. Howell, *supra* note 152, at 651–52.

402. Werdegar, *supra* note 189, at 444.

403. Beres & Griffith, *supra* note 396, at 953.

404. *Id.* at 953–54; GREENE & PRANIS, *supra* note 356, at 36–37.

405. KOREM, *supra* note 154, at 27 (noting that media in the past twenty-five years uses the term gang exclusively in reference to “inner-city” youths); Beres & Griffith, *supra* note 396, at 963–66, 968–70 (discussing the examples of the Trenchcoat Mafia and the Spur Posse, groups of whites who fit within any legal definition of a criminal gang but were not labeled as such); Horowitz, *supra* note 98, at 47 (discussing research indicating that the delinquent activities “of middle-class youth was more destructive than that of the more traditionally defined gangs”); Brian W. Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 311, 319 (2007) (discussing a gang of wealthy white youths, the MLO, that police have never treated as a criminal street gang despite passing the STEP Act’s test for such groups with flying colors).

406. Beres & Griffith, *supra* note 396, at 954; Smith, *supra* note 25.

most individuals considered gang members by law enforcement,<sup>407</sup> Juggalos are alienated from mainstream society and tend to be lower class. If gang definitions remain broad enough that they can be applied to virtually any group of youth with a few criminal members, then anti-gang measures will continue to be disparately enforced towards the poor, the non-white, and the generally disliked.

## VII. THE FUTURE OF LEGAL GANG DEFINITIONS

The concept of the gang is inherently difficult to define with anything approaching certainty.<sup>408</sup> Using gang membership as the basis for creating new crimes or sentence enhancements, as most states and the federal government have done since 1988,<sup>409</sup> endangers the constitutional rights of many people not associated with criminal organizations. The inability of legislatures to create a workable definition for a gang is both frustrating to law enforcement agencies legitimately interested in solving the gang problem<sup>410</sup> and encourages discriminatory enforcement and prosecution of the poor, minorities, and other disfavored groups.

The negative externalities of the war on gangs are theoretically defensible if oppressive anti-gang policies led to a significant reduction in violent crime. However, there is no evidence this is the case. In the decades following the passage of the STEP Act and other anti-gang legislation, violent crime fell.<sup>411</sup> However, both the number of gangs and the number of gang members has risen over the same period.<sup>412</sup> There is no correlation between gang membership and crime.<sup>413</sup> This seeming

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407. See Beres & Griffith, *supra* note 396, at 946.

408. See *supra* Part IV.

409. See *supra* Part VI.

410. Sean E. Boyd, Note, *Implementing the Missing Peace: Reconsidering Prison Gang Management*, 28 QUINNIPIAC L. REV. 969, 976 (2010).

411. GREENE & PRANIS, *supra* note 356, at 13; Bruce Drake, *Rate of Non-Fatal Violent Crime Falls Since the 1990s*, PEW RES. CENTER (June 14, 2013), <http://www.pewresearch.org/fact-tank/2013/06/14/rate-of-non-fatal-violent-crime-falls-since-the-1990s/>.

412. NAT'L GANG INTELLIGENCE CTR., *supra* note 1, at 11. Although truly accurate statistics are difficult to obtain, the National Gang Intelligence Center estimated that there was a 40% increase in gang membership from 2009 to 2011. *Id.*

413. GREENE & PRANIS, *supra* note 356, at 4. Greene and Pranis examined several North Carolina counties and compared the local gang membership rates to the change in violent crime from 1999 to 2004. *Id.* at 63 (citing RICHARD HAYES, GOVERNOR'S CRIME COMM'N, GANGS IN NORTH CAROLINA—A COMPARATIVE ANALYSIS BETWEEN 1999 AND 2004, at 6 (2005), available at <https://www.ncdps.gov/div/gcc/PDFs/SystemStats/Spring05.pdf>; FBI, CRIME IN THE UNITED STATES 1999 (2000), available at <http://www.fbi.gov/about->

abnormality is easily explained when one remembers what sociologists have known since at least the days of Frederic Thrasher: that gangs are not automatically antisocial and the primary activity of almost all gang members is not the commission of crimes.<sup>414</sup>

Law enforcement efforts that seek to stamp out gangs altogether misunderstand the limits of deterrence; it is unlikely that any amount of imprisonment could eliminate gangs.<sup>415</sup> In fact, some have argued that gang suppression efforts based on imprisoning gang members for long periods make criminal gangs stronger and other citizens less safe, “by ‘strengthen[ing] gang ties, rais[ing] [gang members] stature and further marginaliz[ing] angry young men.’”<sup>416</sup> Gang suppression efforts have also been criticized on the grounds that they sap resources from addressing the delinquency of non-gang youths who commit a great deal of crime, even crime typically considered gang-related.<sup>417</sup>

Part of the solution to the gang problem must be the recognition that a group of young men and women without institutional ties is not automatically a threat to society as a whole. Some law enforcement officers feel that if they fail to react with violence towards the small gangs in their jurisdiction, they will inevitably develop into large, violent, drug-dealing organizations characteristic of Chicago and Los

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us/cjis/ucr/crime-in-the-u.s/1999; FBI, CRIME IN THE UNITED STATES 2004 (2005), available at [http://www2.fbi.gov/ucr/cius\\_04/documents/CIUS2004.pdf](http://www2.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf)). The results indicated no correlation between the number of gang members reported by law enforcement and violent crime levels. GREENE & PRANIS, *supra* note 356, at 63. Cumberland County reported an almost 90% drop in gang membership and a 17.6% increase in violent crime; Nash County reported more than a 4000% increase in gang members and almost no change in violent crime; in Rockingham County, gang membership doubled, but violent crime fell 42.9%. *Id.* These numbers probably indicate more about the extraordinary unreliability of statistics on gang membership and crime than they do about the actual relationship of gang membership rates to crime. See Beres & Griffith, *supra* note 396, at 957 (examining homicide statistics and gang membership in Los Angeles and finding no significant relationship).

414. See *supra* Part III.

415. Malcolm W. Klein, *Attempting Gang Control by Suppression: The Misuse of Deterrence Principles*, in THE MODERN GANG READER, *supra* note 110, at 304, 307–12.

416. Boyd, *supra* note 410, at 981 (alteration in original) (quoting *Antigang Crackdowns are Ineffective, Report Says*, L.A. TIMES, July 18, 2007, at B6); Winfree, Jr. et al., *supra* note 110, at 36. Thrasher felt that until a group began to “excite disapproval and opposition” and authority figures tried to “break it up,” the group lacked the cohesiveness of a real gang. THRASHER, *supra* note 49, at 30. Official efforts to destroy a gang did not merely strengthen it, but were necessary to create it. *Id.* Thrasher also noted that “[t]he policeman is ordinarily the natural enemy of the gang and knows no other method of dealing with it but to break it up,” a fact that is unfortunately as true now as it was then. *Id.* at 30 n.2.

417. Winfree, Jr. et al., *supra* note 110, at 36.



Angeles.<sup>418</sup> This is an inaccurate impression of the way nearly all gangs operate. There are good gangs and bad gangs, and the STEP Act's categorization of any organization or association that has one or two participants who have committed crimes as a "criminal street gang" does not adequately address this distinction. Insofar as the goal of the STEP Act and its offspring in other states is the "eradication of [gang] activity,"<sup>419</sup> this legislation is not only ineffective but strives towards a wrong-headed goal.

This is not to deprecate the size and scope of America's problem with gang criminality. It is still in the public interest to "do something" about gangs. Prevention and intervention programs for gang membership, while not a "magic bullet,"<sup>420</sup> remain the only solution to the problem of gang criminality supported by evidence.<sup>421</sup> Rather than a war on gang members, there should be evidence-based and narrowly targeted programming to reduce gang violence.<sup>422</sup> There is an additional advantage to gang intervention programming. Criminalization and suppression programs lead to the violation of non-gang members' constitutional rights and alienates communities.<sup>423</sup> Prevention and intervention programming, on the other hand, strengthens communities, and when a non-gang member is accidentally targeted, the only repercussions are positive, such as an individual being offered educational opportunities or job training.<sup>424</sup>

However, even with careful study, specialists who study gangs have not been able to come to a consensus definition of a gang. In light of the seemingly intractable problem of defining a gang, one obvious solution to the problem of defining gangs in the law would be to eliminate the term from statute books all together. The term gang simply has too

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418. See, e.g., Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in THE MODERN GANG READER, *supra* note 110, at 8, 9.

419. *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 925–26 (Ct. App. 2004).

420. KNOX, *supra* note 49, at 2; GREENE & PRANIS, *supra* note 356, at 95.

421. HOWELL, *supra* note 49, at 237–39; GOLDSTEIN ET AL., *supra* note 75, at 95; GREENE & PRANIS, *supra* note 356, at 95.

422. Beres & Griffith, *supra* note 396, at 978.

423. See Irving A. Spergel, *Community Gang Programs: Theory, Models, and Effectiveness*, in YOUTH GANGS AND COMMUNITY INTERVENTION 222, 229–30 (Robert J. Chaskin ed., 2010) (discussing community views of law enforcement action in suppressing gangs as oppressive and racist).

424. Sara Lynn Van Hofwegen, Note, *Unjust and Ineffective: A Critical Look at California's STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 696 (2009).

much baggage<sup>425</sup> and is too vague for the precise needs of criminal legislation. Both law enforcement and juries may be less likely to bring their existing prejudices to the table if a criminal street gang was instead called a criminal street organization or another term without the baggage that gang has accrued over the years. However, failing to define the term gang would bring its own problems. Anti-gang units of police forces would probably be more confused about what groups they were allowed to suppress. Courts have also used legislative definitions of a gang to interpret that term in other contexts, like probation and parole rules.<sup>426</sup> Overall, abandoning the term gang is unlikely to solve more problems than it creates.

Another possible solution to the problem of overbroad gang definitions is to include additional elements from social science definitions of a gang. As we have already seen, some states include factors other than criminality among their requirements for a gang, including leadership, organization, age, and association with territory.<sup>427</sup> Amending the gang definition in those jurisdictions whose definition is based on the STEP Act to include additional requirements would prevent the criminalization of those groups, like the Juggalos, who have criminals among their members but are not gangs by most social science definitions. A requirement of hierarchical organization, like that from Illinois,<sup>428</sup> or of association with territory, like Michigan's definition,<sup>429</sup> would be especially helpful in limiting the impact of anti-gang efforts.

The obvious problem with this solution is that it depends on state legislatures and Congress to take a position that would be viewed as soft on crime. Many in law enforcement already view the elements that must be proven before gang sentencing enhancements are applicable as unnecessarily Procrustean, and the trend is towards legislatures loosening the requirements of a gang.<sup>430</sup> Future legislative action that

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425. See generally *id.*; Bjerregaard, *supra* note 175, at 43–44 (noting that while sociologists try to use the term gang in a neutral manner, the term is frequently used in a derogatory or negative manner in lay or professional language).

426. See, e.g., *United States v. Green*, 618 F.3d 120, 122 (2d Cir. 2010); *United States v. Vega*, 545 F.3d 743, 750 (9th Cir. 2008).

427. See *supra* Part V.

428. 740 ILL. COMP. STAT. ANN. 147/10 (West 2010 & Supp. 2013).

429. MICH. COMP. LAWS § 750.411v(5)(a) (Supp. 2013).

430. See, e.g., Caruço, *supra* note 325, at 109–10 (discussing the amendment of Florida's anti-gang statute to make it "easier to categorize a specific group as a criminal gang").

will be perceived as soft on crime and will largely benefit historically disfavored groups with little political power is unlikely.

Finally, a possible solution to the problem is for the judiciary to narrowly interpret the existing gang definition in its jurisdiction. Courts have too frequently been willing to allow the state to establish the elements of a criminal street gang on rather thin evidence.<sup>431</sup> Instead of deciding that the primary activities requirement is satisfied by a police officer asserting that gang members commit enumerated offenses on a more than occasional basis,<sup>432</sup> the primary activity requirement should be interpreted literally. It should mean that the gang spends a significant amount of time committing enumerated crimes. The pattern of criminal activity should also be interpreted in line with the legislative intent that that element provide notice to the gang member that he is a member of a criminal street gang. Therefore, the charged crime should not be available to satisfy the pattern element, and only crimes committed by active gang members should be considered. Finally, only crimes committed by individuals that the defendant is in contact with should be considered. If the elements of the criminal street gang definition were interpreted narrowly, many of the issues with vagueness could be eliminated without the need for any action by state legislatures.

This solution to the problem of gang definitions will also run into significant opposition. As discussed above, prosecutors and law enforcement already view the lax requirements of the STEP Act as “lack[ing] the prosecutorial teeth needed to make a definitive difference.”<sup>433</sup> The courts heretofore seem to share the views of media and policymakers that there is a gang crisis in this country and that strong police powers and long sentences are necessary to combat the problem. In the future, courts will hopefully take a more holistic view of the gang problem, appreciating the lessons of social science, the constitutional rights of those affected by anti-gang measures, and the lack of success that such measures have achieved in the real world, and interpret gang definitions more narrowly.

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431. See, e.g., *People v. Williams*, 86 Cal. Rptr. 3d 130 (Ct. App. 2008); *People v. Ortega*, 52 Cal. Rptr. 3d 535 (Ct. App. 2006); *People v. Jose P.*, 130 Cal. Rptr. 2d 810 (Ct. App. 2003).

432. See *supra* Part V.A.2.

433. Jennison, *supra* note 172, at 2016.

## VIII. CONCLUSION

Gang definitions continue to be as prickly and difficult today as they were in the 1930s when the Supreme Court first addressed the issue and declared the term essentially indefinable.<sup>434</sup> Despite some seventy years of social science research in the interim, there is even less consensus today about what constitutes a gang. A vague need to “do something” about the perceived gang crisis has led most American jurisdictions to create sentence enhancements or new substantive crimes for gang members.

As seen in the case of the Juggalos, the vague definitions of gang allow law enforcement to declare essentially any disfavored group with criminal members a gang. While the Juggalos have a multi-million dollar corporation to file federal suit on their behalf, most people unfairly accused of gang membership have little access to legal services. Overly broad gang classification threatens constitutional rights and is ultimately unhelpful in reducing crime. The problem of gang definitions in law is symptomatic of the overall problem with governmental response to gangs. A greater understanding of the gang concept and the motivations and activities of individual groups that have been labeled gangs is necessary to reduce gang-related crime.

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434. *Lanzetta v. New Jersey*, 306 U.S. 451, 453–55 (1939).

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